E810

LOVE, MARRIAGE AND DIVORCE

LOVE, MARRIAGE AND DIVORCE

IN

HISTORY AND LAW

By

JUDGE LOUIS HARRIS

MEMBER OF THE STATE BAR OF
MAINE AND CONNECTICUT

☼

AUTHOR OF
THE STORY OF CRIME
WHEN YOU SIGN A CHECK

THE STRATFORD COMPANY

PUBLISHERS BOSTON, MASSACHUSETTS

Printed in the United States of America

TO

THE SWEETHEARTS, WIVES,
DIVORCEES AND MISTRESSES
OF THE WORLD

WITH ADMIRATION FOR THEIR LOYALTY,
RESPECT FOR THEIR VIRTUE,
AND COMPASSION FOR THEIR MISTAKES.

TABLE OF CONTENTS

PREFACE

PART I

CUPID TRIUMPHANT

PART II

CUPID IN TEARS

A FEW WORDS ABOUT THE BOOK

Strange and mysterious are the ways, and boundless the curiosity of Science. Nothing seems too large or too small to escape its all embracing interest. It points its telescope at the stars twinkling billions of miles away, and with the magic of its spectroscope finds out what they are made of; their size, temperature, motion and distance. It looks through its microscope and reveals the wonders and mysteries hidden in the tiny cell and crystal, objects so small that thousands grouped together would hardly equal the size of a grain of sand. It works over its test-tubes and retorts, and discovers hundreds and thousands of new combinations of matter. It measures the speed of light; it calculates the thickness of the film enclosing a soap-bubble; it determines the weight of the sun, the heat and pressure in the center of the earth, the age of the rocks; it maps the orbit of the vagabond comet; it computes the energy in a grain of sugar; it breeds mice for the purpose of discovering the inheritance of "behavior patterns;" it calls to its aid the far reaches of mathematics and discovers a new planet; it investigates the reflex actions of mosquitoes; it . . . but the task is endless.

Yet of all its limitless activities, perhaps the most unusual was the hiring of eavesdroppers to overhear and tabulate the conversations of men and women in cities and towns all over the country. In offices, stores, houses; on the street, in theaters, restaurants, hotels, trains, busses, etc. etc. All to find out what subjects are of most interest to the public at large.

The exact results of this research into the thoughts of men and women, as later published, is not now before me; but if memory serves me well, I believe it was somewhat as follows: The subjects most discussed were first, "Love," (something that is said to furnish the power that makes the world revolve); second, "Marriage," (or what have you); and third ("if you have tears, prepare to shed them now"), Divorce.

If you are in love, you are to be congratulated; if happily married, you are most fortunate; but if you are one of the many who have found marriage to be the death of love, and its promise of happiness to be "a delusion and a snare," take heart: there may be a way out.

More has been written and spoken and sung of love than of any other subject. The chirp of the cricket, the purr or growl of the wild beast, the song of the bird, the giggle of the flapper, the sigh of the widow, and perhaps many of the first sounds

of all living creatures are all expressions of love; they were originally intended as love-calls for a mate. Nearly all music, drama and poetry, and much of prose is devoted to the love theme. Little or nothing that is new remains to be said of this subject.

Likewise has marriage furnished a prolific source of literature. The origin of the customs of marriage, its history, social bearings and other aspects have been investigated and written by several able students of this branch of sociology.

Strange to say, however, divorce has received comparatively little attention from writers of social problems. True, a flood of magazine articles and newspaper editorials have touched on the so-called "evil of divorce." But the history and law of divorce, written so the ordinary person, who is neither a sociologist nor a lawyer, can obtain some helpful information on the subject, is not readily available.

There are in this Country approximately one hundred twenty million persons. Allowing an average of four to a family, gives us about thirty million families. As there are two married persons to each family (not counting the negligible percentage of families presided over by a widower or widow), it appears that there are approximately sixty million married persons in the United States.

At a most optimistic estimate, at least half of this great number are not entirely happy in the marriage relation. This unhappiness may vary from an occasional quarrel or bit of resentment, to intolerable misery verging on desperation. That this is true may be vouched for by any lawyer or judge that has had experience in the divorce courts.

It may thus be readily seen that the subject of divorce has considerable interest to millions of persons who have no means of information except to consult with a lawyer regarding their troubles.

Many who desire some knowledge pertaining to the various causes or grounds for divorce refrain from consulting a lawyer because of timidity, or because of a natural reluctance of revealing intimate domestic details to another, even though that other may be a member of the legal profession.

It is, therefore, for those who have set out on the stormy sea of matrimony, and whose ship of hope has foundered on the rocks of disillusionment and despair, that this book is written.

Text-books on law are notoriously "dry as dust." In the hope of making this work more readable than the ordinary legal text-book, some concessions have been granted to modern idioms and even to some "slang." Yet, though parts of this work dealing with the law of engagements, marriage and divorce have been written in a manner

intended to amuse, no sacrifice of legal accuracy has been made in order to attain this end.

For those who may be interested in the early history and law of marriage and divorce, a brief review of this phase of the subject is given. Yet there may be many who are not curious regarding the academic side of the subject, but yet may desire definite, practical information on the present law regarding same. Such readers may find the information they desire in the legal parts of the book, where is summarized briefly the law regarding marriage and divorce as at present in the decisions of the various States. As the legislatures are apt to amend or repeal these laws at any session, it would be advisable, in case of any specific problem, to consult with your local attorney regarding any possible change.

In the Chapter dealing with the law of "Breach of Promise," as in other chapters of this book treating of the legal aspects of the problem, I wish to emphasize the fact that the law is correctly stated regardless of the occasional facetious remarks.

Although primarily intended for the guidance of those who may need it, it is hoped that the contents of this book will not be uninteresting to those who have found, or who hope to find, happiness in matrimony.

PART I

CUPID TRIUMPHANT

CHAPTER I

HISTORY OF MARRIAGE

THERE may be love without marriage; there may be mating without marriage; there may even be (most unfortunately) children without marriage: but (believe it or not) there can be no divorce without marriage.

Marriage and divorce are opposite sides of the same problem, and whoever would write of the one must write of the other.

Before passing to the laws regulating the institution of marriage, it may be of interest to first briefly consider a bit of its history. Like all problems reaching into the dim and shadowy past, the writers on the early history of marriage are far from being in accord. The debris of numerous changes of customs, habits, manners, occupations and environment, and the obscuring veil of countless centuries, hide the beginnings of what is now called the marriage relation.

Whether primitive men and women mated with the same promiscuity as some of the lower animals; whether the matings were more or less restricted

to certain members of the same family or tribe, or to certain members of other tribes; or whether there was from the first a more or less rigid monogamy, is not known. And like all problems the solution of which is unknown, the question of the origin of marriage has divided the investigators of the subject into a number of different schools, each with its own theory, and each opposing the theories of the others.

Without attempting or even hoping to clear up the mystery surrounding the origin of the marriage institution, we may yet find some interest in examining some of the early known customs of marriage and, in a later chapter, some of the early known customs of divorce.

The early Romans gave to the world something besides Roman noses, spaghetti, and fiddle-playing Emperors. For according to Mr. Bryce, "The Romans built up the marriage laws of the civilized world."

Likewise are we indebted to the Hebrew race for something more than "gefilte fish," auction-pinochle and the pants manufacturing industry. For if the Romans developed the marriage laws, so the Hebrew law humanized the marriage relation, and raised the family life to a loftier plane than it had previously known.

But in the history of marriage, or perhaps it would be more correct to say the history of sexual mating, we must start long before either Romans or Hebrews appeared on the scene.

The investigator of the distant past finds it useless to attempt to place a definite period as the beginning of primitive events, customs or institutions. Perhaps as good a method as any is to follow the example of the fairy story, and begin with the phrase "Once upon a time." So let us begin the fascinating subjects of sex, love, marriage and divorce, in the same manner.

Once upon a time there was neither man nor woman; there was neither male nor female of any animal or plant. There was merely something that, for want of a better name, we will call "Life." Perhaps it would be more correct to say there was something that possessed the "quality" or "attribute" we call "Life."

This first living thing was very tiny and could hardly be told apart from the surrounding things that did not possess this magic quality (unless it be that everything that exists possesses life to some degree). However that may be, this peculiar living thing possessed a most remarkable power: the ability to grow and reproduce itself.

At first thought this seems to imply two distinct processes, but in the very early forms of living

things reproduction is merely an extension or a variation of the process of growth.

These tiny creatures lived and grew by absorbing nourishment from the surrounding media, usually a liquid containing matter suitable for its food. This process of absorption of food is known as "osmosis." It means that certain nutriment-carrying fluids can penetrate the thin membrane or skin surrounding the little cell composing the minute primitive animal or plant. As it feasted it grew; and as it grew it stretched its little skin. After attaining to a certain size it changed from a spherical to an elongated form; it contracted in the middle to make a waistline; it contracted still more at this waistline until it looked something like a tiny dumb-bell (the kind used in gymnastic exercise). And finally, with perhaps a little convulsive shudder, it broke in two: and there we have the earliest known method of reproduction. Without courtship, without mating, without "benefit of clergy," nature had done its work, and the population of the world was increased. So chaste had been the entire procedure, that even Anthony Comstock would have approved. And a description of the romance and amatory experiences of the lowly amoeba would have passed the censorship of the Boston Watch and Ward Society, with its code of fig-leaf morality.

Let us pass over all the various methods and experiments that Nature tried in order to secure the perpetuation of the species before evolving a method of reproduction by sexual mating, and start our story with a description of some of the curious and interesting customs of marriage practised in the long ago.

How did human society, or the social group, come into being? What was its origin, and how did it develop?

To these questions anthropological research has given considerable attention in an attempt to find out how the earliest social group was formed, how governed, and how preserved.

It is unlikely that man, even in his most primitive state, lived entirely alone. But if not alone, how else? Most probably with his mate and children. The family, then, constituted the earliest social group. As one writer has put it, among all the races of antiquity, "the constitution of the family was the basis and prototype of the constitution of the State." The family, in one form or another, must have been the initial society among all human races.

But who governed the early social group, and what were his powers? The most reasonable answer to this question would seem to be that the strongest person in the group would rule by very virtue of

his physical strength. And if there were none strong enough to curb his power, it must have been, so far as the welfare and even the lives of the other members of the family were concerned, absolute.

As the strongest person in the family would naturally be the father, especially so while the children were still immature, there would arise a system of father-rule. This theory of the early social group is sometimes called the "Patriarchal Theory."

Of course, as the sons grew up to manhood, and as the patriarch of the family grew old, he would lose the actual power to enforce his will; but before this happened so imbued had the minds of the children become with the idea of his absolute rule, that he never lost it. (We can easily understand how this might happen when we observe apparently intelligent people hold to the belief in the infallible wisdom and power and virtue of certain classes of men, despite the fact that they are given daily evidence that these exalted ones make the same mistakes, are subject to the same weaknesses, and yield to the same temptations as the rest of humanity). Therefore, having been taught from earliest childhood that the patriarchal will was law, it so remained even when the law-maker became old and feeble.

The rule of the patriarch or family-father was

most despotic; and he exercised the power of life and death over his wife and children. He could, and often did, sell his children into slavery; and of course they could own no property unless he chose to give it to them. As in all despotic government, the greatest crime was disobedience, and a disobedient child would often be put to death for the slightest cause.

Though this condition doubtless existed among many tribes, it is probable that occasionally, when the sons of the family reached manhood, there would be some resistance to the arbitrary rule of the father. As the instances of successful rebellion to the patriarchal will increased, there would ultimately come a time when the younger men would get together and, emboldened by previous successful revolt, would unite in resisting the formally absolute despotism of the old man of the family. In this way would there come about a form of tribal government somewhat resembling a small limited monarchy.

Some historians have questioned the theory that father-rule was the form of government of the earliest social group. These writers claim that the original form of sexual mating was an unregulated communism, the men and women of the tribe mating promiscuously. In such case the paternity of the children would necessarily be uncertain: only

the mother would be known to her young. Where sexual mating is promiscuous, it would indeed be a wise child who knew its own father. The maternity of the child alone being certain, the mother would become the natural ruler of her children and, therefore, the ruler of the tribe. This form of a somewhat limited promiscuity in sexual mating is sometimes known as communal or group "marriage". And the government of the tribe by the women is called matriarchal government, or the rule of "mother-right."

Whether the patriarchal form of government came first, or whether it was preceded by the rule of "mother-right" is not certain. It would seem, however, that as the union of the sexes was in the earliest times probably transitory and promiscuous, and as under such conditions the father was not known, while the mother brought up the children, the first form of rule would be that of mother-right. In support of this we find in primitive societies that kinship is often traced in the female line. Under such conditions the ties that bound the primitive social group were not based on a definite knowledge of blood kinship, but existed because the members had been companions in war or the hunt, or had shared the same grove or cave. Then, perhaps, gradually the idea of

blood relationship arose; but at first this relationship would be known only through the mother.

But how came there a change from promiscuous and transient sexual union to a more definite and permanent institution? Some writers have held that this change was largely brought by the almost universal practice of female infanticide. Primitive man was ignorant; he was without efficient weapons or tools; and as in physical strength he was inferior to many of the wild beasts that surrounded him, his position was comparatively helpless and often extremely precarious. Before the invention of implements and the arts, the struggle for existence would often become desperate. At such times, when life was at stake, the instinct of self-preservation would manifest itself; for society had not yet reached the stage where the individual would be governed by unselfish affections.

In the deadly struggle for food and security caused by famine and foe, the weakest and least necessary of the tribe would be sacrificed. Warriors and hunters were always required and could be of value in maintaining the life and security of the tribe; but in times of great stress the girls and women could be dispensed with to advantage. Hence arose the general practice of female infanticide: a practice that is even now said to exist

in certain parts of China and India, and perhaps in some other over-populated districts.

This practice of female infanticide caused a disturbance in the natural numerical balance of the sexes, and gave rise to a series of changes in the sexual relations prevailing in primitive society; causing the adoption of various marriage customs. The value of women, like most other things in the world, is subject to the law of supply and demand. The natural consequences, therefore, of the diminished supply of women caused by female infanticide was to enhance the relative importance of women in the amorous eyes of the men. Each female of mating age would now have several wooers contending for her favor. Rivalry became intense, and was "unrestrained by any sense of delicacy from a copartnery in sexual enjoyments." This rivalry for woman's favors resulted in frequent quarrels and strife between the masculine members of the group; and in order to save the tribe from complete internal disruption, some form of compromise had to be found. This was finally obtained by the adoption of a community system of "marriage" where the women were held in common like other chattels of the tribe. Harmony was thus established and maintained through a gradually acquired sexual indifference and a sharing of the women of the tribe.

Following the sexual promiscuity which was, in all probability, the initial form of sex-union, we come next to another form of "marriage" as the result of this scarcity of women caused by the practice of female infanticide. This other form of relationship is known as "polyandry", and consists of a system of marriage wherein the woman has a number of "husbands." This system may be regarded as establishing the earliest type of "family" in the proper use of the word: that is, a family resting upon a marriage or a courtship of man and woman having the approval of public opinion, or the protection of custom or law. Polyandry may be regarded as a general phase of the evolution of marriage, and as the first improvement or modification of the original promiscuity.

This somewhat restricted form of mating has been held to be the medium of transition from kinship in the mother-line to the paternal system of kinship and inheritance. And ultimately it led, through "contract-marriage" in the form of wife-purchase, to our modern system of the marriage relation.

In the lower forms of polyandry we find a condition closely resembling sexual communism. The wife does not live with her husbands, but with her mother or brothers. As in a plurality of husbands the actual fathership of the children is un-

known, kinship and inheritance are necessarily in the mother-line. In this type of family no child knows his actual father, and every man considers his sister's children as his heirs.

In a somewhat higher form of polyandry the wife leaves her mother's home and establishes a home of her own. She then cohabits with her various husbands according to more or less rigid rules. As we reach the most advanced type of polyandry, as at present practised in Tibet, we find still greater restrictions regulating the marriage relations of the wife and her husbands; and here we approach many of the elements constituting the modern family. In this highest form of polyandry the wife lives in the house owned by her husbands, who are often brothers. Usually when a number of brothers choose a wife, the right of choice belongs to the eldest brother. All the children of the family are considered to be his, and almost always the first child is definitely known to be his. In this advanced form of polyandry we find a change from mother-kinship and inheritance to that of father-kinship and inheritance. For in this type of family the paternity of the child is not entirely uncertain; and when the husbands are brothers, the father's blood is always definite.

We now reach a point where polyandry merges into "monogamy," which is the marriage of one

man with one woman. That this change is gradual is shown by the fact that in some sections of India polyandry and monogamy are said to exist side by side. In this transitional stage "one man, for example, may have a wife exclusively his own, while his brothers may choose one in common." Usually when one brother has taken a woman to wife, and paid the dower to her parents, the other brothers or very near relatives, all living together, may gain the rights of husbands, "if both he and she consent," by simply providing their respective shares of the dower, which almost invariably consists of from one to four buffaloes. Under this system of marriage "no females, whether married or single, possess property; but, under all circumstances of life, are supported by their male relations, being fed from the common stock."

When we consider that one or more brothers may become the husband of the same wife, or of separate wives, and that other brothers may purchase shares in the wives already in the family, we can readily understand that many degrees of complication in lawful wedded life may be met with. The gamut of married relationship may run all the way from a "single man living with a single wife to that of a group of relatives married to a group of wives." In the endeavor to prevent further complications in tribes practising polyandry,

an attempt is made to keep widows in the family. This is done by putting pressure on the brother of the husband to marry the widow in case of the husband's decease. This custom of the husband's brother marrying the widow is mentioned several times in the Old Testament, and probably was due to some system similar to polyandry.

It is, then, through polyandry that the transition from the maternal to the paternal system of kinship and inheritance takes place. And as soon as monogamy becomes the prevailing custom of marriage, the paternal system of kinship becomes firmly established.

A further result of a scarcity of women would be the widespread custom, among primitive peoples, of "wife-capture." When not occupied in the effort of obtaining food, primitive men are assumed to be engaged in strife with hostile tribes. And among the various spoils of war, the women of the vanquished foe would naturally be considered the most valuable; especially when there was a great scarcity of these highly desirable creatures. The practice of wife-capture, carried out on a large scale, would naturally lead to polygamy. But "since there can be no certainty as to fatherhood where the practice of seizing the women from hostile tribes obtains, wife-capture is the means of maintaining the system of counting kinship through

the women only; and the existence of that system, at some time, must be inferred wherever wife-capture or its form in the marriage ceremony is discovered."

One further result of female-infanticide, and its resulting scarcity of women, remains to be noticed. We have just seen how a scarcity of women would lead to wife-capture from enemy tribes. We have now to note that this practice of capturing wives outside the tribe leads to what is known as "exogamy," which means the rule or law forbidding the marriage of persons within a recognized kindred of the same group or tribe; that is, among those having the same totem. Exogamy need not necessarily "be regarded as a result of any tribal prejudice against intermarriage of those related by blood." And, doubtless "marriage within and without the tribal group was practised indifferently, as pleasure or opportunity favored." But as the ability to capture many wives from enemy-tribes implied skill and valor in the warrior, and would, therefore, become a mark of distinction and a matter of pride to the one who was successful in capturing the greatest number of wives from the foe, so "eventually the possession of a foreign woman was looked upon as the more honorable or respectable; and so at last marriage within the kindred was entirely forbidden."

Other conditions than a scarcity of women caused by female-infanticide may have been instrumental in causing primitive men to give up promiscuity for a more or less rigid monogamy. What else, then, would cause the primitive male to forego the pleasures of other women and live for a longer or shorter period with the woman he had taken as a mate? The answer is probably to be found not in any special affection for the woman of his mating, but rather in the gradually developing desire to protect and care for his offspring.

The human child, compared with the young of other creatures, is of extremely slow development. Whereas the young of most animals are able to care for themselves after a period varying from a few days to a few weeks or months, the young of the human family is practically helpless for years.

It is obvious that among those tribes that gave to the child protection and care for the longest time, a greater number would naturally survive to maturity than among those tribes in which the young were very early neglected or abandoned. The tribes, or clans, or families raising the greatest number of children to maturity would soon outnumber and overpower those in which neglect or abandonment of the young during their helpless stage prevented a rapid increase in numbers. In other words, the custom that slowly arose of hav-

ing a permanent wife and home, had a definite "survival value" to those tribes that gave up sexual promiscuity in favor of a union having some permanence.

It is characteristic of wolves that when one of a group is injured, the rest of the pack attack the wounded one and tear it to pieces. The same ferocious cruelty is true of other wild animals, and may have been true of primitive man. His constant struggle for existence in a hostile environment, his ever present danger from wild beasts and human foes, gave little opportunity for the growth of the gentler emotions which are largely the result of a sympathy developed in peace and security.

In that savage breast was no place for pity. No tear ever softened the cruel glance in those deep-set eyes. Primitive man expected no mercy and gave none.

How utterly without feeling a human being can be is well illustrated in the event described by Charles Darwin in his "Voyage of the Beagle," of a native of Tierra del Fuego, who seized his infant child by the ankles and dashed its brains out against a rock, in front of its own mother; merely becauses it had committed some childish fault.

But way back in that long, long ago of the early morning of the race, in some dim cave or other rude shelter, the brutish brain of our early ancestors, that had known only the twin curses of fear and hate, must have stirred to a new and strange sensation of something vaguely like tenderness. This strange softening of that harsh nature may have been brought about as it looked at the helplessness of his infant, or watched the mother clasping her babe to her breast.

The establishing of a home by the male of the family gave him more opportunity for seeing his children; and even in the brutish heart of the primitive savage, the helplessness of infancy must have sometimes made its appeal. The bloodshed and cruelty of war and the hunt would for the moment give way to the gentler influence of tender childhood.

However vague or slight may have been this consciousness of something different from his habitual selfish brutality, it held a world of promise for the future of mankind. For then

> "The softened pressure of an uncouth hand, a human gleam in an almost animal eye, an endearment in an inarticulate voice—feeble things enough, yet in these faint awakenings lay the hope of the human race."

It is not to be understood that the views given here have been accepted with any degree of unanimity by the writers on primitive family life. Many criticisms, for instance, have been brought against the theory that the practice of female-infanticide had such far-reaching effects in the formation of the various marriage customs. For, granting that it has prevailed to a considerable extent throughout the world, it still remains doubtful that the practice would greatly disturb the numerical balance of the sexes. For, as Herbert Spencer has put it, "tribes in a state of chronic hostility are constantly losing their adult males, and the male mortality so caused is usually considerable. Hence the killing many female infants does not necessitate lack of women; it may merely prevent excess." And Starcke, in his "Primitive Family" has pointed out that there is nothing in a "scarcity of women which could lead a community accustomed to promiscuous intercourse to adopt polyandry; on the contrary, such a scarcity would make it more difficult to set limits to promiscuity." Many other criticisms by various writers have been brought forth. Indeed, the entire subject seems hopelessly engulfed in a sea of contradiction. However, as the purpose of this book is merely to suggest some of the theories that have been held regarding the early forms of marriage,

and as it is at present impossible to reach any degree of certainty, we will have to be content with describing some of the views that leading writers have held on this subject without further comment on the validity of these views.

Before passing to the consideration of the "marriage contract" it may be of interest to examine briefly a few of the theories that have been held regarding the "original pairing."

Opposed to the theory that there existed among primitive tribes a general state of sexual promiscuity, are the arguments advanced by those who believe that men and women from the earliest times mated with certain restrictions, and lived together within some limitations. "We have no reason to regard the social life of man as a recent form. Not only do the same physical forces which influence gregarious man also influence the gregarious animal; probability also leads us to infer that the primitive communities of mankind are derived from those of animals. Since man in so many respects only goes on to develop the previous achievements of animal experience, it may be supposed that he made use of the social experience of animals as the firm foundation of his higher advancement."

It is well known that certain of the higher spe-

cies of animals live in pairs for a period varying from the time required to raise a single brood, to a life-long union. So that if we assume that the earliest culture of humanity began at the highest point reached among animals, we may say that even the most primitive humans lived together for an extended time to the exclusion of other possible mates. "If we want to find out the origin of marriage," says Westermarck, in his "History of Human Marriage," "we have to strike into another path, the only one which can lead to the truth, but a path which is open to him alone who regards organic nature as one continued chain, the last and most perfect link of which is man. For we can no more stop within the limits of our own species, when trying to find the root of our psychical and social life, than we can understand the physical condition of the human race without taking into consideration that of the lower animals." And after some examples from various kinds of animal life, and particularly among birds, showing that a growing concern for the young of the species has led to a prolonged pairing, he says: "Parental affection has reached a very high degree of development, not only on the mother's side, but also on the father's. Male and female help each other to build the nest, the former generally bringing the materials, the latter doing the work. In fulfilling

the numberless duties of the breeding season both birds take a share. Incubation rests principally with the mother, but the father, as a rule, helps his companion, taking her place when she wants to leave the nest for a moment, or providing her with food and protecting her from every danger. Finally, when the duties of the breeding season are over, and the result desired is obtained, a period with new duties commences. During the first few days after hatching, most birds rarely leave their young for long, and then only to procure food for themselves and their family. In cases of great danger, both parents bravely defend their offspring. As soon as the first period of helplessness is over, and the young have grown somewhat, they are carefully taught to shift for themselves; and it is only when they are perfectly capable of so doing that they leave the nest and the parents."

Several other arguments have been advanced to disprove the theory that promiscuity or sexual communism was the original form of human relationship. As the truth is obscured by countless centuries of change, and as the lowest tribes in the cultural scale now existing are yet far advanced from the earliest stages of humanity, the actual conditions that prevailed in the early dawn of the race may never be known. Let us pass, then, to a point where history throws some light, dim though it may

be, on the marriage relation which is effected by means of some form of contract, implying a union of some duration.

When authentic history begins to light our way in the search for the origin of early matrimonial institutions, we find that marriage early began to be effected by means of some form of contract. Usually the transaction is similar to an ordinary "contract of sale" by which, for a valuable consideration, the bride is sold by the father or guardian to the bridegroom. At first this contract was an actual purchase of the bride by her prospective husband. In other words, the wife was actually "bought and paid for."

At a somewhat later date the manner of transfer of the bride from father or guardian to the bridegroom underwent various modifications, until at present the elements of sale are usually represented only by some ceremonial form having a symbolical character.

We have seen that the capture of women from enemy tribes, as a means of getting wives, was a practice almost universal among primitive men. The evidence of this is derived from the fact that "wife-capture" is even now in actual existence among many savage peoples in various parts of the world. Further evidence is held to be derived from the "symbol of capture" or, as it is sometimes

called, the "symbol of rape," which occurs in many marriage ceremonies throughout the world.

The capture of women as part of the ordinary spoils of war is to be expected among savage races. Anything that can be taken away from the vanquished foe becomes the property of the victor. "The taking of women is manifestly but a part of the process of spoiling the vanquished." These captured women may become wives, mistresses, concubines, or slaves, at the pleasure of the captor.

The actual capture of women is now a rare occurrence except among a few remaining savage tribes. But the symbol of the practice remains more or less vividly in the marriage ceremony of peoples in many countries. It "occurs in every shape and in every grade of significance, from the brutal combat of the Australian savage to the harmless prank of casting the old shoe with which among ourselves the wedding festivities are enlivened. It exists in connection with every phase of development, from the rudest savagery to the most advanced type of Aryan culture; and it is found among the same people, sometimes in various forms, side by side with actual capture or associated with the most refined conception of the marriage relation."

Many illustrations of these strange and curious practices are to be found in the works of various

writers dealing with the history of human marriage. Space can here be given for but very few. "Among the Eskimo of Cape York, the marriage is arranged amicably by the parents in the infancy of the parties. Nevertheless the wedding ceremony simulates an abduction. The bride is obliged by the inexorable law of custom to free herself, if possible, by kicking and screaming with might and main, until she is safely landed in the hut of her future lord, when she gives up the combat very cheerfully, and takes possession of her new abode." In the Ungava District, the girl "disappears mysteriously, to remain out for two or three nights with her best female friend, who thoroughly sympathizes with her. They return, and before long she is abducted by her lover, and they remain away until she proves to be thoroughly subjected to his will." Among the Canadian Indians, "the groom turns around, makes an obeisance, takes his wife upon his back, and carries her to his tent amid the acclamations of the spectators." Among the Kalmucks, the marriage ceremony is usually performed on horseback. "A girl is first mounted, who rides off in full speed. Her lover pursues: if he overtakes her, she becomes his wife, and the marriage is consummated on the spot." Among the Bedouins of Sinai "the bridegroom seizes the woman whom he has legally purchased, drags her into her father's

tent, lifts her violently struggling upon his camel, holds her fast while he bears her away, and finally pulls her forcibly into his house, though her powerful resistance may be the occasion of serious wounds." Among certain peoples the wooer, "like Jacob of old, is expected to earn his wife by serving her parents. He takes upon himself a good part of the domestic labor, and the term of service sometimes lasts for a number of years." One would naturally think that having won his bride by an extended labor, no violence would be required to consummate the marriage; nevertheless, we are told: "When the period of novitiate has expired, the future spouse must violently and publicly triumph over the resistance of his betrothed. She is cuirassed with garments, thick and superimposed, with straps and with strings. Moreover, she is guarded and defended by the women of her youth. The marriage is not definitely concluded until the bridegroom, surmounting all these obstacles, succeeds in perpetrating upon his intended, so well protected, a sort of outrage upon her modesty, which she ought to confess by crying out *ni ni* in a plaintive voice. But the women and the maidens of the guard fall upon the assailant with loud cries and heavy blows, pulling his hair, scratching his face, and sometimes throwing him over. Victory often requires repeated assaults, sometimes days

of combat. Only when at last it is won and the bride yields herself is the marriage concluded." In Ireland, up to quite recently, especially in the mountain districts, we are told that the bridegroom "was compelled in honor, to run off with his betrothed, even when there was not the least need of it." And in Wales, about a century ago, the bridegroom rode with his friends mounted on horses to demand the bride. "Her friends, who are likewise on horseback, give a positive refusal, upon which a mock scuffle ensues. The bride, mounted behind her nearest kinsman, is carried off and is pursued by the bridegroom and his friends, with loud shouts. It is not uncommon on such an occasion to see two or three hundred sturdy Cambro-Britons riding at full speed, crossing and jostling, to the no small amusement of the spectators. When they have fatigued themselves and their horses, the bridegroom is supposed to overtake his bride. He leads her away in triumph, and the scene is concluded with feasting and festivity."

Not only has the symbol of wife-capture survived in the marriage ceremony, but the practice of wife-purchase still remains in certain ceremonial forms. It would seem that marriage by purchase succeeded wife-capture as a later practice, denoting a higher stage of development. Such at least, is the view generally held by students of this

subject. Spencer thought that purchase was the usual substitute for violence as civilization progressed. On this subject he says: "We may suspect that abduction, spite of parents, was the primary form; that there came next the making of compensation to escape vengeance; that this grew into the making of presents beforehand; and that so resulted eventually the system of purchase."

Both forms of marriage, that is, wife-capture and wife-purchase, are sometimes found side by side among peoples still backward on the path to civilization. Certain Indian tribes of Ecuador "acquire wives by purchase, if the woman belongs to the same tribe, but otherwise by force." Several methods of buying a wife exist. Sometimes the purchase is made by means of an exchange. When this is done the prospective husband gives some kinswoman to the father of the bride in exchange for her. Sometimes the wife is obtained in exchange for a sister, or somewhat later in life perhaps for a daughter. Quite general is the custom known as "marriage for service," by which the bride is earned by the bridegroom serving, for a specified time, his future father-in-law. "Among the Mayas the young husband is required to build a house opposite the home of his bride and live in it five or six years while he works for her father. If the service is not faithfully performed, he is dismissed,

and the father-in-law gives his daughter to another. In Yucatan the term of service is three or four years; and so stringent is the requirement that it is regarded as highly unseemly to shirk the duty." But the most common way of purchasing a wife is by giving property in exchange. "Usually the amount of the price is arranged, like any other bargain, by an agreement between the interested parties; but sometimes it is established by custom. Always where the contract is merely a commercial transaction the price is in theory an equivalent for the economic loss sustained by the family or gens of the bride. But the amount varies in every possible way. Often it depends upon the rank or beauty of the woman; or it may be determined by her strength and capacity for bearing children. It varies also with the economic condition of the times, the wife-market (like the market for other commodities) depending largely upon the law of supply and demand. In hard times, or where there is an excess of women, wives are cheap; when times are good or women scarce, the price rises in proportion. Among peoples somewhat advanced in culture sentiment must, of course, be taken into account. Where it is regarded as a disgrace to accept a small compensation for a daughter, high prices may lead to celibacy. Such, at the beginning of the past century, was the case in Servia,

where the bridegroom, in addition to the purchase price, was expected to bestow liberal presents, not only upon the bride and her mother, but also upon all her near relatives."

And here we have another example of the old saying "there is nothing new under the sun," for we are told that "the bride need not necessarily be purchased for cash." Possibly the bridegroom who can afford to pay cash for his bride receives a better price, or is given a liberal discount. Perhaps the credit of the prospective husband is investigated and, if found wanting, cash in advance may be insisted upon. For we read: "Sometimes the full price must be given before the nuptials; often the bride is received on credit, and the price subsequently paid in instalments. In case of credit, the wife with the children usually remain with her father, and the husband does not gain absolute ownership or control until the debt is paid in full." This puts the bride in the same class with automobiles, radios, electric refrigerators and other instalment luxuries. Perhaps some ancient advertisement might have run something as follows: "Why do without a nice young bride, when you can purchase her for a dollar down and a dollar a week?" Or: "A small deposit and the balance in easy weekly payments." Or the offer may have been made to accept the old wife as a down payment

on a nice new one, balance to be arranged for in easy instalments.

Among the aborigines of North and South America, "actual wife-purchase, both by property and by services rendered, is exceedingly common; though in some tribes, as in other parts of the world, the transaction takes the form of a simple exchange of gifts or of a bestowal of presents upon the bride's parents. The price is usually paid in horses, but many other forms of property are employed." And we are surprised to learn that the "noble Indian" can sometimes be a very good business man who is capable of driving a sharp bargain in buying or selling a wife. Also we are told that among the Indians of northern California "marriage is sometimes essentially a matter of business. The young brave must not hope to win his bride by feats of arms or softer wooing, but must buy her of her father, like any other chattel, and pay the price at once, or resign in favor of a richer man. The inclinations of the girl are in nowise consulted; no matter where her affections are placed, she goes to the highest bidder. The social position of the bride depends upon the price she brings; and, as a natural result of the system, the rich old men almost absorb the female youth and beauty of the tribe, while the younger and poorer men must content themselves with old and

ugly wives. Hence their eagerness for that wealth which will enable them to throw away their old wives and buy new ones." What a masculine paradise this old world would be if wives could be traded in for the latest models as readily as automobiles.

The Dakota Indian seems to be willing to sacrifice beauty and talent in a wife for unromantic but practical qualifications, and often "makes capacity for work the standard of female excellence, and having made an election, buys a wife from her parents by the payment of an amount of property, generally horses." "To give away a wife without a price is in the highest degree disgraceful to her family."

The above illustrations of wife-purchase are merely a few selected from a mass of material on the subject. The custom seems to have been prevalent, at some time or other, in all parts of the world. It is mentioned as a common usage in ancient Greece, in Babylon, in Thrace, in Arabia, in China, and throughout other countries of Asia; and, as stated in the illustrations, it prevailed among the Indian tribes throughout North and South America.

We have thus seen that the marriage relation has passed from a more or less universal promiscuity, through wife-capture, and later through wife-

purchase; and now we come to the latest phase of the marriage relation in which the parties enter into the relationship of their own volition, and the wife is obtained, like the wine and milk so generously offered by Isaiah, "without money and without price."

While humanity was still in a very low stage of culture, hardly more advanced than the higher species of animals, the "marriage" relation was probably assumed at the choice of both parties. Occasionally, perhaps, the union was against the will of the woman, who may have been forced to yield through the employment of brute force. But Westermarck, in his "History of Human Marriage" has shown that there was considerable freedom of choice on the part of the female even among the most primitive men, as there certainly is among most of the lower animals. In nearly all cases the male does the courting, and the female must be won by considerable wooing.

The capture of wives, especially on a large scale and in a systematic way, implies a certain amount of advancement in social organization. Even more true is this in the case of wife-purchase, which also implies a developed system of property ownership and an appreciation of economic values. So it seems fair to assume that before these comparatively advanced stages of social evolution

had been reached, human mating was generally free from any consideration except the desire and consent of both parties. In fact, investigation has established that "among very low races, betrothal is a compact between the bride and the bridegroom. So that in this regard the lowest and the highest stages of culture represent the same phenomena."

It is a common observation that an advance in one direction is often combined with a degradation in another. As primitive man gradually evolved from the hunting and foraging stage to a condition where property ownership assumed considerable importance; and being untamed as yet by any of the gentler sympathies, he soon discovered that woman had an economic value as a chattel and household drudge. And as he was the stronger of the two, he imposed his will on the weaker member of the union.

Whatever hardship the practice of wife-capture may have imposed on the woman, it yet involved a certain amount of "romance," however wild and crude it may have been. To be fought for, and to be considered as a valuable prize of battle, had its glamour. But when wife-capture was succeeded by wife-purchase, the position of woman took on its most abject and degraded conditions. To be regarded simply as a chattel like any other piece

of property, and to be valued the same as domestic cattle, denoted the lowest condition to which a human being can sink. During this period the woman's feelings and wishes in marriage were utterly ignored. Her lot was pitifully hard and degrading.

Regarding the status of women under primitive conditions, Herbert Spencer has written: "The only limit to the brutality women are subjected to by men of the lowest races, is their inability to live and propagate under greater. Clearly, ill-usage, under-feeding, and over-working, may be pushed to an extent which, if not immediately fatal to the women, incapacitates them for rearing children enough to maintain the population; and disappearance of the society follows. Both directly and indirectly such excess of harshness disables a tribe from holding its own against other tribes; since, besides greatly augmenting the mortality of children, it causes inadequate nutrition, and therefore imperfect development, of those which survive. But short of this, there is at first no check to the tyranny which the stronger sex exercises over the weaker. Stolen from another tribe, and perhaps stunned by a blow that she may not resist; not simply beaten, but speared about the limbs, when she displeases her savage owner; forced to do all the drudgery and bear all the burdens, while she

has to care for and carry about her children; and feeding on what is left after the man has done; the woman's sufferings are carried as far as consists with survival of herself and her offspring."

And this cruel treatment of women had, according to Mr. Spencer, considerable influence in forming certain notable female characteristics. It explains not only "the light that lies in woman's eyes," "and lies, and lies, and . . . ," but it also explains the speech that so often lies on woman's lips. Let us read his interesting theory: "If we trace the genesis of human character, by considering the conditions of existence through which the human race passed in early barbaric times and during civilization, we shall see that the weaker sex has naturally acquired certain mental traits by its dealings with the stronger. In the course of the struggles for existence among wild tribes, those tribes survived in which the men were not only powerful and courageous, but aggressive, unscrupulous, intensely egoistic. Necessarily, then, the men of the conquering races which gave origin to the civilized races were men in whom the brutal characteristics were dominant; and necessarily the women of such races, having to deal with brutal men, prospered in proportion as they possessed, or acquired, fit adjustments of nature.

"How were women, unable by strength to hold

their own, otherwise enabled to hold their own? Several mental traits helped them to do this. We may set down, first, the ability to please and the concomitant love of approbation. Clearly, other things equal, among women living at the mercy of men, those who succeeded most in pleasing would be the most likely to survive and leave posterity. And (recognizing the predominant descent of qualities on the same side) this, acting on successive generations, tended to establish, as a feminine trait, a special solicitude to be approved, and an aptitude of manner to this end.

"Similarly, the wives of merciless savages must, other things equal, have prospered in proportion to their powers of disguising their feelings. Women who betrayed the state of antagonism produced in them by ill-treatment, would be less likely to survive and leave offspring than those who concealed their antagonism; and hence, by inheritance and selection, a growth of this trait proportionate to the requirement. In some cases, again the arts of persuasion enabled women to protect themselves and, by implication, their offspring where, in the absence of such arts, they would have disappeared early or would have reared fewer children."

And Spencer also believed that the oppressions that were suffered by women through successive generations were the cause of their ability to

quickly discover the thoughts and feelings in others; an ability sometimes called "woman's intuition." For, he says: "In barbarous times a woman who could, from a movement, tone of voice or expression of face, instantly detect in her savage husband the passion that was rising, would be likely to escape dangers run into by a woman less skilled in interpreting the natural language of feeling. Hence, from the perpetual exercise of this power, and the survival of those having most of it, we may infer its establishment as a feminine faculty. Ordinarily, this feminine faculty, showing itself in an aptitude for guessing the state of mind through the external signs, ends simply in intuitions formed without assignable reasons; but when, as happens in rare cases, there is joined with it skill in psychological analysis, there results an extremely remarkable ability to interpret the mental states of others.

"Of course, it is not asserted that the specialties of mind here described, as having been developed in women by the necessities of defense in their dealings with men, are peculiar to them; in men also they have been developed as aids to defense in their dealings with one another. But the difference is that whereas, in their dealings with one another, men depended on these aids only in some measure, women in their dealings with men depended upon them almost wholly—within the do-

mestic circle as without it. Hence, in virtue of that partial limitation of heredity by sex, which many facts throughout nature show us, they have come to be more marked in women than in men."

In other words, if women are deceitful in their dealings with men, it is because deceitfulness was a quality (or lack of quality) that enabled them to survive primitive man's brutality. If it has become a feminine characteristic, it was originally due to masculine viciousness. Well might woman say to man, if taunted for being deceitful in her dealings with him, "You made me what I am today, I hope you're satisfied." Perhaps man is generally "satisfied," but there is a "smoking car story" to the effect that satisfied does not always mean contented.

And yet, in spite of the practice of wife-capture and wife-purchase, occasionally there must have been cases where a certain amount of choice on the part of the bride was allowed by some indulgent parent. Or perhaps the girl exercised her choice by eloping with her lover. As humanity slowly advanced in culture there was probably a gradual transition from the degrading influence of wife-purchase to a marriage based on mutual affection, and resting on the choice of the parties. As George Elliott Howard has said: "The facts appear to demonstrate that woman's original liberty of

selection has never been entirely lost. It is evident that wife-purchase, though sometimes the means of degradation, even of marital bondage, is compatible with a high degree of matrimonial choice. The ideas which influence the "uncivilized" man in selling his daughter are probably often very similar to those which govern the thrifty father in modern society when he insists on securing a good match for his child. The price is regarded as a fair equivalent for the services to which the parent is justly entitled in return for rearing the girl. The Kafir maiden who brings a good price from her suitor is not therefore necessarily a chattel any more than is the daughter whose labor the civilized parent lets out for hire. A high price may be looked upon also as a proper recognition of the rank or of the mental and physical attractions of the bride." Accordingly, "it is sometimes regarded as a disgrace to marry without payment of the bride-price; and the girl takes pride in the amount she brings to her father."

Nevertheless, the custom of buying wives can exist, in its crude form, only among peoples of a very low stage of culture. For as soon as some advance is made in the cultural stage, it becomes an offense against the finer feelings of woman to be put in the same class as chattels. But while the custom of wife-purchase was gradually abandoned

as an actual practice, traces of the form have remained for a long time in various wedding ceremonies. Sometimes the ancient custom is represented by the giving of a penny or other small coin to the father or guardian of the bride. Or it may survive in the custom of giving presents to the bride's parents. Among some peoples "custom requires that a part, sometimes all, of the gifts constituting the price of the bride, or their equivalent, shall be returned to the bridegroom or his family." Or the purchase price may be given to the bride by her parents as a wedding gift. Or it may be paid by the bridegroom directly to the bride in the form of a gift. At a somewhat later stage, both the groom and the father of the bride may join in giving the bride a wedding present; and at a still later period the father may give an independent gift to the bride, which comes at last to be transformed into a dower or "dowry."

So it seems that "the institution of dower takes its rise in two principal sources; either it is derived through the return gift from its exact opposite, the ancient purchase price of the bride; or, as a means of providing in some way for the wife as a member of the new household, it has developed along with free marriage, and stands as an expression of the natural motives and desires upon which the human family rests." Strangely enough,

in our own society the marriage portion "has become a purchase sum by means of which a father buys a husband for his daughter."

Like much of the apparent progress made in other departments of life, the movement in the evolution of human marriage has been in a circle; and we have arrived at the point of beginning. Starting at the time when humanity was but little above the animal world in the cultural scale, we find that man did the wooing and that woman exercised her sexual choice, much as she does now (except, perhaps, in the primitive cases of wife-capture during war with enemy tribes).

As humanity entered the pastoral stage, with the concomitant development of property ownership, the woman lost part of her freedom of choice. The father or guardian, at this stage, takes a hand in selecting the bridegroom on the basis of his ability to pay the purchase price of the bride. Thus the practice of wife-capture, and wife-purchase, deprived the woman of her former freedom in the choice of a husband. But with an increasing culture and refinement of feeling in the marriage relation, and with the increasing economic independence of women, self-betrothal again comes to be the prevailing custom.

No longer does the bridegroom buy his wife; at least not directly. Yet many a modern maid

takes a fugitive glance at the pages of "Dun's" and "Bradstreet's" when selecting an intended husband. And this in spite of the old saying which still holds true: "In many a marriage made for gold, the bride is bought, and the bridegroom sold." And even when the marriage is not "made for gold," the husband often pays the price, if not in advance, then later in the popular form of alimony. But that is another story, to be told in a later chapter.

We have said that the "progress" in the human marriage relation has been in a circle. Perhaps it might be more correct to say that the movement has been in the manner of a pendulum. Beginning with man as all powerful and the woman considered either as a chattel, drudge, or slave, her position has steadily advanced until she has assumed not only a position of equality, but the pendulum has started to swing the other way, and in many countries, particularly in our own United States, woman has been put on a pedestal and raised to a height that she had never even dared to hope for. It is the man that has now become the chattel, drudge and slave of his newly deified goddess. His position in many a household, instead of being master of the house, now resembles nothing in the house except the doormat: and a doormat that is not even embellished with the word "welcome."

But if he becomes dejected at the present pic-

ture of his downfall, let him take heart; for the law governing the movement of the pendulum requires that when it has reached the limit of its swing, it must change its direction and retrace its course. It is inevitable that the poor "worm will turn," and the modern husband, often called a "poor fish" (probably because he is so deeply submerged in the present sea of matrimony), may yet come to the surface for a last gasp of air before he perishes ignobly by drowning in the ocean of his shame.

CHAPTER II

MOON MADNESS

BEFORE the actual marriage ceremony takes place, and the parties have been united in the bonds of wedlock "till death (or the divorce court) do them part," there is, almost universally, an engagement agreement between the prospective bride and groom. In these hectic days (or nights) the engagement is often preceded by several "petting parties," but as the law takes little or no notice of these preliminaries (unless performed in too public a manner), we will begin by noting the legal significance of the "old, old story" whispered into the shell-like ear of the heroine; and of her blushing acceptance. In short, we will examine what the law has to say when he asks, "Darling, will you be mine?" and she answers "Yes, sweetheart" (or words to that effect).

Like all contracts or agreements, to be legally valid, there must be an offer by one party, and an acceptance by the other. When he says "Will you marry me?" he is making a legal offer of supporting her for life; and when she replies

"yes," he is legally bound to carry out his implied promise of marriage with all its accompanying responsibilities. If he fails to do so, he becomes liable for damages in an action of "breach of promise." So, girls, if you are looking for "heart-balm" in the form of a verdict for damages for failure to marry, pay strict attention to what follows. Damages for breach of promise has been the soothing liniment that has eased the pain of many an aching feminine heart; so it may be well worth your while to learn under what circumstances you become entitled to it.

Like other kinds of agreements, the agreement to marry can only be binding on certain parties who possess the necessary qualifications for entering into a legal contract. First, they must be of legal age; but if one of the parties is of age and the other not, the one that is of age is bound by the agreement, if it is otherwise valid. It therefore behooves the fair charmer who wishes to extract a promise of marriage from the young son of a millionaire, to first make certain that he is at least twenty-one years of age; otherwise she may find her smiles and caresses utterly wasted.

A party under legal age is called in law an "infant," and the infant may obtain judgment against the other party to the agreement, if such other party was of age. But the infant is not liable.

Besides the qualifications of legal age, the parties to the agreement must be what is called, in legal phraseology, "compos mentis," which means, in common speech, that they must have a certain amount of common sense. No idiot or lunatic can make a valid legal agreement to marry, (in spite of all the evidence to the contrary). The question therefore arises, just how much mentality must a person have to enter into a legal agreement to marry? (Yes, you sour old cynic, you are right): very little brains will be sufficient for the purpose, according to the law on the subject. For if the parties know enough to understand the nature of the marriage relation, and its duties and responsibilities, it will do. No greater, if as much, mental capacity is required to enter into a valid agreement to wed, than to make an ordinary business contract. Any person who has brains enough to execute a deed, or make a will, can get married. It has even been held by a dignified Court that if a party can go through the wedding ceremony with propriety, he has sufficient understanding to be bound by his agreement. So cheer up! there is hope for most of us. Unless the party, as stated above, is an imbecile or lunatic, (now you disgruntled old bachelor, you need not speak, we all know what you would like to say), he may legally undertake the duties of wedlock.

In order to be binding, the promise of marriage must be "mutual." That is, there must be an actual offer of marriage by one of the parties, and an actual acceptance of the offer by the other. If the hero of our story merely says "My love, I can not live without you," (or something equally idiotic), such remark is not a legal offer; and the heroine is not yet entitled to the balm of damages. He must actually offer to marry the girl: and she must actually accept the offer and agree to marry him. If when the love-sick Romeo says "Will you be my wife?" she replies "I will be a sister to you," (or some other such inanity), the victim is not yet caught: for he still may slip off the hook and escape. In order to get a legal clutch on him, she must definitely accept his proposal. Then let him get away if he can! Not only must she definitely accept the offer of marriage, but she must do so within a reasonable time after the offer is made. Until definitely accepted he has the legal right to change his mind and withdraw the offer, and thus be free of further obligations. So girls, if you really want him, speak quick!

The Courts have held, however, that an acceptance need not necessarily be made orally: it may be implied from the conduct of the parties. So if the fair maid is so overcome with emotion that she can not speak, she may yet show by her acts that

the proposal is accepted. One of the leading writers on the Law of Marriage has this to say: "Seduction, for example, may be proved to show that a promise of marriage has been made and accepted." However, the Courts are divided on this question; some decisions holding that even sexual intercourse between the parties is no evidence of a marriage proposal and acceptance. As one learned Judge said in a leading case: ". . . such evidence, we think, should be limited, and so far as we are advised, it has been limited, to the open, visible and public conduct of the parties toward each other. The illicit intercourse of parties is generally consummated in the strictest privacy and secrecy, and is known only to the parties themselves; and the evidence of the parties or of others in regard to such intercourse can have no possible tendency to prove the existence of a promise of marriage."

It is a fundamental rule of contracts, that no agreement is legally valid that is based on an immoral consideration. So a promise to marry in consideration of sexual intercourse can not be enforced; even though the woman become pregnant. Yet if the promise of marriage has been actually made, and the woman, relying on the promise of the man to marry her, yields to his sexual embrace, the intercourse is not in such case the consideration of the promise, and therefore the agree-

In order to be binding, the promise of marriage must be "mutual." That is, there must be an actual offer of marriage by one of the parties, and an actual acceptance of the offer by the other. If the hero of our story merely says "My love, I can not live without you," (or something equally idiotic), such remark is not a legal offer; and the heroine is not yet entitled to the balm of damages. He must actually offer to marry the girl: and she must actually accept the offer and agree to marry him. If when the love-sick Romeo says "Will you be my wife?" she replies "I will be a sister to you," (or some other such inanity), the victim is not yet caught: for he still may slip off the hook and escape. In order to get a legal clutch on him, she must definitely accept his proposal. Then let him get away if he can! Not only must she definitely accept the offer of marriage, but she must do so within a reasonable time after the offer is made. Until definitely accepted he has the legal right to change his mind and withdraw the offer, and thus be free of further obligations. So girls, if you really want him, speak quick!

The Courts have held, however, that an acceptance need not necessarily be made orally: it may be implied from the conduct of the parties. So if the fair maid is so overcome with emotion that she can not speak, she may yet show by her acts that

the proposal is accepted. One of the leading writers on the Law of Marriage has this to say: "Seduction, for example, may be proved to show that a promise of marriage has been made and accepted." However, the Courts are divided on this question; some decisions holding that even sexual intercourse between the parties is no evidence of a marriage proposal and acceptance. As one learned Judge said in a leading case: ". . . such evidence, we think, should be limited, and so far as we are advised, it has been limited, to the open, visible and public conduct of the parties toward each other. The illicit intercourse of parties is generally consummated in the strictest privacy and secrecy, and is known only to the parties themselves; and the evidence of the parties or of others in regard to such intercourse can have no possible tendency to prove the existence of a promise of marriage."

It is a fundamental rule of contracts, that no agreement is legally valid that is based on an immoral consideration. So a promise to marry in consideration of sexual intercourse can not be enforced; even though the woman become pregnant. Yet if the promise of marriage has been actually made, and the woman, relying on the promise of the man to marry her, yields to his sexual embrace, the intercourse is not in such case the consideration of the promise, and therefore the agree-

ment is valid. In such a case, if the promise is not kept, there may be an action for damages.

In a leading case where the suitor had proposed and been accepted on a Sunday, and then, having a change of heart, sought to avoid liability in a breach of promise suit on the grounds that agreements made on Sunday are void, the Court said: "A contract of marriage under our law is a purely civil contract. Nothing is added to its legal force or obligation by entering into it with religious rites or ceremonies. Yet no one would contend that it would be unlawful for a civil magistrate to complete the execution of such a contract by joining parties in matrimony on the Sabbath, or that a contract of marriage entered into before and solemnized by a magistrate would be invalid because the act was done on the Lord's day. The reason is obvious. Such an act does not come within the category of transactions which are connected with, or appertain to, ordinary world business. It is neither labor, business, nor work in the sense in which these words are used by the legislature."

In general it may be said that if the agreement to marry is in violation of public policy, or opposed to accepted morals, it is void. So a contract of marriage based on a wager is unenforceable. So, too, is a contract to wed where one or both of the parties are already married, though made con-

tingent on either or both obtaining a divorce. But if one of the parties is married and conceals the fact from the other party, the innocent party may maintain an action for the breach of promise. And though a promise of marriage is void if obtained by deception, yet if a man proposes to an unchaste or lewd woman, knowing her to be such, and she accepts, his promise is binding.

At one time not only was a promise of marriage obtained by deception utterly void, but it was even considered a serious criminal offense. An Act introduced in the English Parliament in 1770, to protect men from being enticed into matrimony by the use of artificial adornments, was as follows:

"That all women, of whatever age, rank, profession or degree, whether virgins, maids, or widows, that shall from and after this Act, impose upon, seduce, and betray into matrimony, any of his Majesty's subjects by the scents, paints, cosmetic washes, artificial teeth, false hair, Spanish wool, iron straps, hoops, high-heeled boots, or bolstered hips, shall incur the penalty of the law in force against witchcraft and like misdemeanors, and that the marriage, upon conviction, shall stand null and void." What a blow such a law would be today to the rouge and lipstick industry! It is not known whether this Act has ever been repealed or not, but if it is still in force it must

have created a larger number of unconvicted female criminals, between the ages of 16 to 60, than all other laws combined!

Now, what does the law say regarding the time of the marriage. The old song ran: "You said we'd be married in June my dear; you mentioned the month, but you didn't say what year." In such event, when no definite time is set for the wedding, the law implies a reasonable time after the engagement, depending on the circumstances of the particular case. But girls, it is safest to pin him down to a certain date. If you can prove the day and month and year of the promised wedding, to the Jury, your chances of obtaining "love-salve" from the defendant is practically assured.

It is also a good idea to specify the place of the wedding. But when the promise is silent on that point, the law considers the residence of the prospective bride to be the place of marriage, unless proved otherwise.

To be legally enforcible the promise and acceptance in the marriage agreement must be free from duress, fraud, or concealment of any material and important facts: especially facts relating to the ability of the parties to properly perform all their marital duties. So if one of the contracting parties discovers that the other is suffering from a venereal or other incurable disease, the innocent party is

freed from obligation; but the guilty one is not thereby released from liability.

So far we have been speaking of the law relating to the making of the contract to marry, usually called an "engagement." Let us now see what hāp-pens when the promise of marriage is broken.

CHAPTER III

SOBER SECOND THOUGHT

THE two loving hearts having beat as one, and mutual promises having been exchanged, now what next? How long does the engagement last if not consummated by marriage? In general, it may be said that an engagement agreement to marry continues in force until one of the parties, either by word or conduct, shows an unwillingness to carry out the promise. The contract may be dissolved by the mutual consent of both parties; or for any legal incapacity of either party, such as infancy, impotency, consanguinity, death of either party, etc. But we are here concerned mostly with a failure to fulfill the agreement when no legal defenses intervene.

Assuming, then, that there has been a valid offer of marriage and an acceptance of the offer, when can the promise be said to be broken, so as to give rise to an action for damages to the injured party. This happens when one of the parties refuses to marry the other at the time promised; and if no definite time was set, then within a reasonable time,

depending upon the circumstances of the case. The breaking of the promise may be by words or conduct. So it was held a breach of promise when the defendant in the suit, before the date set for the wedding, declared that he would not go through with it. Likewise was it so held in cases where the man refused to communicate with his fiancée, or to maintain friendly relations with her. And it is the same when he in any way gives her to clearly understand that he does not intend to keep his agreement.

If before the date set for the marriage, the defendant does some voluntary act that makes it impossible for him to keep his promise, as by marrying some other woman, the plaintiff may immediately treat such act as a breach of his promise to her, and need not wait until the date set in order to bring suit. It has also been held that if, while the engagement was in force, the defendant seduced the plaintiff, she had an immediate right of suit, since the engagement agreement "involves protection and respect, as well as affection." In this case the Court said: "Such an engagement brings the parties necessarily into very intimate and confidential relations, and the advantage taken of these relations by the seducer is as plain a breach of trust, in all its essential features, as any advantage gained by a trustee or guardian or con-

fidential adviser, who cheats a confiding ward, or beneficiary, or client into a losing bargain."

In one case the girl had brought an action for seduction against a third party, in another state, and her betrothed on learning of it, broke his engagement with her. She then brought suit against him for breach of promise, and the Court held that under the circumstances she was not entitled to damages, as the man was justified in breaking his agreement.

The relation of outsiders to the parties in a marriage agreement is somewhat different than in other kinds of contracts. Whereas a person who interferes in such a manner as to induce one of the contracting parties to break the agreement, to the damage of the other contracting party, is usually liable to the injured party for so meddling, the courts have held that a third party who induces the breach of a marriage contract is not legally liable for so doing. This rule is said to be for reasons of public policy, and to recognize the rights of rivals for the hand and heart of either of the engaged parties. Again proving that "all is fair in love and war."

In case the passionate lover loses his ardor, and seems reluctant to carry out his promise to wed, how soon can the lovely maiden demand her "heart-ease" in Court? Well, that depends. If a

definite time has been set, and Romeo refuses to "carry on," the jilted one may at once throw shyness to the winds, and instruct her lawyer to bring suit against the wretch. But if no definite date has been set for the wedding-bells to ring out the glad tidings, then, unless the neglectful one has clearly repudiated his promise, she must first make a request that the agreement be fulfilled, and also declare her own readiness to perform her part of the contract. If he still refuses to abandon his state of single bliss, she need wait no longer; and, deserting Cupid for cupidity, may start action at once, and let the law take its course.

It should be understood, however, that the girl's formal request that he carry out his promise is only necessary when his intentions are undecided. Where, however, he clearly renounces his promise to marry and stops all attentions to his fiancée, she may start suit without first making a request and without offering to perform her part: as such request and offer would be useless. Should maidenly modesty prevent her making the request and offer in person, it may be made by the father or guardian, or by any other close relative or friend who has the authority to do so. In this way the neglected damsel may retain her demure shyness, and still collect.

Having noted the dire things that may happen

to the luckless male who changes his mind about taking unto himself a partner to share his joys, and possibly some of his sorrows, let us see if there remains for him any legal method of retaining both his liberty and his bank account. Well, yes: there are a few loopholes in the law through which the worm may crawl. In general, if the one he was about to take unto his manly bosom turns out to be quite a different woman from what he had reasons to believe, either regarding her character, physical or mental health, or any cause that would prevent her from properly performing her marital duties, such facts may be utilized as a defense to a breach of promise suit. Especially would this be the case if the designing female wilfully practised deception concerning these important details. But in order to be available as a defense, these infirmities or faults must be quite serious. Ordinary little undesirable traits, or objectionable habits, will not enable the frightened suitor to escape with his cash. It has been held in a number of cases that a false and fraudulent representation regarding wealth, rank, business or social position, is sufficient grounds for a defense to a breach of promise suit.

Serious ill health, or incurable disease of either party will usually warrant breaking the engagement, without incurring legal liability. So will the

recurrence of venereal disease, of which the defendant had thought himself cured, be a valid excuse for not performing the marriage contract. But if he became infected before the engagement, and knew of his condition; or if he contracted the disease subsequent to the engagement, he will be responsible in damages. In other words, he can not take advantage of his own misdeeds to shield himself from the penalty for failing to fulfill his promise.

Insanity which afflicted either party before the marriage (no comments from the gallery please), is good ground for breaking the engagement. So, too, is any physical malformation which prevents marital relationship a valid defense. And it has been held that where the woman voluntarily submitted to an unnecessary operation, which rendered her incapable of bearing children, she could not, thereafter, insist either upon marriage or damages.

There are a few other defenses available to the hesitating "boy-friend" in a breach of promise action that may here be considered briefly. If after his failure to keep his promise, and before his sweetie has shown an intention of bringing suit, he makes a new offer in good faith to marry the girl, such offer is a good defense to a suit for the original failure to perform. But it is not so if he

has failed to keep his word as originally given, and has not made a new offer in good faith until after suit was begun. If he has not enough "sex-appeal" to induce the plaintiff to change her mind, he had better call up his banker and try "checks-appeal."

Neither is the "sugar-daddy" liable for breach of promise if he has obtained a clear release from his dearie. But, apparently, the release must be unequivocal. It has been held that the mere return of the engagement ring is not such a release from his promise of marriage as would be a good defense to her suit. Neither is it a release if she says that she forgives him for choosing another bride in her place. Or if she tells him that if he wishes to call the engagement off, he may do so. Or other acts or words on her part that do not show a clear intention to release him from liability for damages.

Now, girls, having learned under what circumstances you may become entitled to some of the villain's gold, we have next to inquire about how much cash you can make the scoundrel pay. "It's the woman who pays," has been sung so long, that it is now time to turn the tables, and give the darlings a chance to collect.

Just how much the jilted one gets from the wretch is up to the jury; and in fixing the amount, they are supposed to take into consideration all

the facts and circumstances of the particular case. The damages to which the sweet thing is entitled includes her actual money losses, if any; injury to her future prospects; the loss she will suffer in not coming into the property of the defendant, as his lawful wife; the loss of chances of her marrying someone else; the loss of time and expenses in getting ready for the wedding; the shock to her nervous system, and injury to her health; her wounded pride, mental suffering, and humiliation; and, of course, the injury to her wounded affections and broken heart. You see, ladies, there are quite a lot of things connected with a breach of promise suit for which you can collect cold cash. No doubt, if you are coached and prompted a little by a good lawyer (and what lawyer is not good?), you will be able to think up several other things for which the scoundrel should pay. Just think of all the pure affection, and the wonderful and perfect love you bestowed on the big brute; how he just toyed with your deepest and most sacred emotions; how his change of sentiment broke your tender heart (here is a good time to take out a nice little perfumed handkerchief from your purse and wipe away a tear: this has a splendid effect on the jury). But unquestionably your lawyer will see to it that you are properly advised as to all the cute little arts

and tricks of the game (particularly if he has taken your case on a contingency fee).

And, dear reader, you might as well know that there are circumstances where the damages in a breach of promise action are especially large; or, as they are sometimes called, "punitive" or "aggravated" damages. Such damages are sometimes awarded where the lady has suffered special loss or injury; or to punish the defendant for some special wrong committed by him to the plaintiff. Usually the aggravated damages are awarded for seduction under a promise of marriage; and then a refusal to carry out the promise. (Such things do happen; though, of course, to most of our fair readers this is merely of academic interest). But it must also be said that in order to entitle the broken blossom to aggravated damages, she must prove that there was actually a seduction; and that she yielded only on reliance of his promise of marriage, and not merely to satisfy her own inclination, passion, curiosity or cupidity.

While several circumstances determine the amount of damages that may be awarded to the heart-broken plaintiff, some of which have just been mentioned, the most important one to consider is the defendant's financial condition, and his ability to pay the judgment. A verdict against a defendant who is poverty-stricken is usually com-

paratively small. And even if a large amount is awarded to the plaintiff, it would probably be uncollectable. On the other hand, if the tearful little woman sobs out her tale of woe into the ears of a sympathetic jury, against a man of wealth, the gentlemen of the jury are very apt to be quite liberal; O, yes, even extremely generous with the defendant's money. If they can be bountiful at some other person's expense, then why not go the limit? They usually do. So girls, be advised, and pick 'em rich.

Throughout the treatment of this subject, we have considered the plaintiff to be the woman, and the defendant to be the man; but it is to be understood that either party to an engagement contract is liable in money-damages for failure to perform. But since in at least ninety-nine per cent of the breach of promise suits the woman is the complaining party, the number of cases in which the male party becomes plaintiff in this kind of action may be considered as negligible.

CHAPTER IV

THE TIE THAT BINDS

THE brave and handsome hero of our story having overcome terrific obstacles which beset the path to his one true love; having braved innumerable dangers; having killed countless dragons and giants; and at last, with a supreme effort, having vanquished the crafty, cruel villain who had relentlessly pursued the beautiful heroine; our gallant knight finally clasps the radiant princess in his manly arms. The earth ceases for a moment its mighty swing around the sun; the very stars tremble with excitement; and for a brief spell the entire universe throbs to the beating of his valiant heart, while she softly whispers "yes." "And so they were married and lived happily for ever after." An appropriate ending for a fairy tale.

Now back to earth. Having previously discussed the nature of the engagement contract; and having noted the dire consequences that may follow the failure of performing it; let us now examine what

happens when the course of true love finds its way to the altar (or justice of the peace).

The bonds of matrimony having been duly riveted to the loving couple; the honeymoon over; and the blushing bride having blushed her last blush; to what legal status do they awake in a cold and indifferent world? For marriage is a legal institution of which the law is extremely jealous, and watches closely every move.

We have seen that marriage usually has its inception in an engagement contract; and now we find that marriage is in itself a contract: but a contract of a rather peculiar kind. Whereas other contracts entered into by two parties may be rescinded at the will of the same parties, the marriage contract can not so easily be rescinded or terminated by either party or both at their own desire. For the law regulates the conditions of marriage, regardless of the wishes of those most interested. Certain forms or ceremonies must be complied with before the marriage is legally valid; and certain conditions must exist, and proper legal steps taken before it can be legally terminated. The contract of marriage is in law assumed to be a life-long contract, and by it the husband is legally obligated to support and maintain his wife during her life; unless the relationship is ended by a decree of a proper court for such reasons as may be

specified by the statutes of the particular state or country where the parties are domiciled.

To many people marriage has a religious character, but the law, being devoid of sentiment, recognizes it only as a civil contract creating a certain legal status, and not as a sacrament. As Sir William Blackstone has said: "Our law considers marriage in no other light than a civil contract. The holiness of the matrimonial state is left entirely to ecclesiastical law. Such a contract is good and valid, if the parties were, at the time of making it, willing to contract, able to contract, and actually did contract in the proper forms and solemnities required by law."

And Mr. Bishop, in his treatise on "Marriage and Divorce" says: "Marriage is a civil status of one man and one woman united in law for life, under the obligation to discharge, to each other and the community, those duties which the community by its laws holds incumbent on persons whose association is founded on the distinction of sex."

As we have seen that the parties to an engagement contract must possess certain qualifications, such as legal age, and a sane mentality, so, too, must they possess like qualifications in order to legally enter the marriage relation. In other words, as mutual consent is the essence of all ordinary contracts, so is it likewise necessary to the validity

of the marriage contract. Not only must the parties be capable of consenting, but they must in fact consent to form this relation. But if the marriage has been performed with the proper ceremonies, and the obligations of the relation undertaken, the validity of the marriage will not be affected by any agreement not to live together, nor by any agreements previously made by the parties that the marriage should not be binding. Neither is the status affected because one or both of the parties did not intend it to be a permanent condition. And if one or both of the parties, being possessed of a virginal mind, made an ante-nuptial agreement not to cohabit, such agreement is void and may be repudiated by either party.

The legislatures of the various states have exclusive power for the regulation of marriage and divorce, and they may prescribe who may or may not marry, the age at which they may marry, the various procedures and ceremonies necessary to constitute a valid marriage, the duties and obligations of the parties in the marriage status, the property rights of the parties, and the circumstances which may give grounds for the dissolution of the marriage contract. The laws regarding these matters vary slightly in the different states, but in general are as here stated.

Besides the mental and physical capacity of the

parties, before mentioned, there are certain restrictions against marriage which are created by statute, and which are based upon reasons of public policy. So it is illegal to marry within certain degrees of blood relationship. Also, some states, especially in the South, prohibit the marriage of persons of different races, such as white and Negro, or white and Indian, or white and Mongolian.

In most states the law also prescribes the manner of the ceremony, and by whom the marriage may be performed. Usually it specifies that a marriage ceremony may be performed by an ordained minister of the gospel, a justice of the peace, sometimes a judge or clerk of a court, or according to the rites of certain recognized sects, such as the Quakers.

As a rule the formalities prescribed by law are essential to the validity of a marriage. But in case of some slight informality, the general policy of the law is to sustain the marriage status. By statute, in several states, the marriage of a man or woman revokes any will that may have been previously made, unless the will makes provision in contemplation of the marriage, or otherwise shows that it is to remain in force after marriage. However, it is always safest for married people to draw a new will.

It would seem that men and women should know

whether or not they are married; but this is not so simple as one might think. For quite often two people who have gone through what they believe to be a marriage ceremony, find that they are not legally married after all. So we come now to the question: When is a person married, and what law governs the validity of the marriage contract? Usually, the legality of a marriage ceremony depends upon the law of the place where it is performed. If legal and valid there, it is, as a general rule, valid everywhere. Yet, like most rules, this one has its exceptions. For it sometimes happens that the marriage laws of one state or country are so opposed to the public policy of other states or countries, that certain kinds of marriages which may be legal where performed, are not considered so in other places. As Judge Story has said: "The most prominent, if not the only known exceptions to the rule are those marriages involving polygamy and incest, those positively prohibited by the public law of a country from motives of policy, and those celebrated in foreign countries by subjects entitling themselves under special circumstances to the benefit of the laws of their own country."

In some of the Southern States, the marriage of a white person with a person of the Negro race is prohibited by law, and such marriages are considered null and void. But as such mixed marriages

are allowed in other states, couples of such mixed races will sometimes go to the state allowing such marriages, have the marriage ceremony performed there, and then return to their former state, in which mixed marriages are prohibited. There is some conflict in the laws of the various states regarding the situation which arises under these circumstances. In a famous case in Massachusetts, a Negro and a white person, who were both domiciled in Massachusetts, where such marriages were prohibited by law, went to the adjoining state of Rhode Island, where such a marriage was legal. When the case appeared before the Massachusetts Supreme Court, it was held that as it was valid in the State of Rhode Island, where it was performed, it was therefore legal and valid in Massachusetts.

Opposed to the above case was one in which a Negro and a white person, who were both residents of North Carolina, where such marriages were prohibited, went to the adjoining state of South Carolina, where such marriages were legal, and were there married. Upon their return to their domicile in North Carolina they were haled into Court; and on appeal, the Supreme Court of North Carolina declared the marriage void; disregarding the fact that it was legal where performed. This decision was apparently based upon the fact that the couple went to South Carolina purposely to evade the law

of North Carolina; and this being considered a fraud upon the laws of North Carolina, the marriage was declared illegal. For, in another case, where such a mixed marriage took place in South Carolina, and both parties later moved to North Carolina with the intention of making that state their home, the marriage was held to be valid because there was no intent to practise a fraud by intentionally evading the North Carolina law as in the former case.

It sometimes happens that certain blood relations, such as first cousins, uncle and niece, or aunt and nephew, are allowed to marry by the laws of some states and prohibited by others. In these cases the same rule governs: if there was no special intent to evade the law of the state prohibiting such intermarriage, such marriage will be considered valid everywhere, if it was so in the state where performed.

But where the laws of a certain country are so utterly opposed to the practice and policy of other countries, no marriage of such a nature will be considered legal elsewhere, even though valid in the country where the marriage took place. So if polygamy (the marriage of one man with a plural number of wives), or polyandry (the marriage of one woman with a plural number of husbands), is legal in a certain country, such marriages

would not be tolerated in countries or states having laws to the contrary.

So we find that the rule is as follows: "A marriage valid where it is performed is valid everywhere." To this general rule there are the following exceptions: (1) Polygamous and polyandrous marriages. (2) Incestuous or other unnatural marriages. (3) Marriages which are expressly declared by statute to be void, and which are performed in other states purposely to evade such law. (4) Sometimes marriages by parties under the age of consent, evasively performed in other states, have been held void in the state of residence. (5) In general, any marriage contracted by residents of one state, by going into another state for the purpose of evading the laws of their own state, may be declared void by the courts of said state, especially if there is no change in domicile.

Though a marriage which is valid in the locality where it is performed may or may not be valid elsewhere, as we have just seen, it is well settled that if it is not valid under the laws of the state where it took place, then it is not valid anywhere. And if it was performed in some place where no definite law governs, such as on the high seas, it is not legal in any state or country.

It sometimes happens that a man and woman,

legally capable of assuming the marriage relation, decide to do so without any ceremony, either civil or ecclesiastical. When this is done, and the couple live together publicly as man and wife, it is called a "common-law marriage."

Under the old Canon law, and by the law of nature, marriage was considered to be simply the result of an agreement between a man and woman to become husband and wife: no formal ceremony was considered necessary. The Canon law, regarding this matter, was changed in 1563 by a decree of the council of Trent, which declared that thereafter a ceremony by a Priest, in the presence of witnesses, was required to validate the marriage. This decree was adopted by most of the Catholic countries of Europe; but it never became law in England. There the old Canon law remained in force, and was carried over to the American colonies. So that in the early colonial times, common-law marriages were valid in all the colonies, and are yet in a number of the United States. But in most of the states some form or ceremony is now required by statute.

Even in those states that still recognize common-law marriage, certain conditions are essential to its validity. There must be mutual consent of the parties to the agreement; and mutual capacity to fulfill the duties of the relationship. It is also essen-

tial that both parties undertake the matter seriously, and understand clearly that neither one, nor even both, can rescind the agreement, or annul the marriage relation at their own choice. In other words, though a common-law marriage requires no ceremony, the parties are as much married as though they had gone before a minister or priest, or justice of the peace. The only way such a marriage can be dissolved is by a decree of divorce in a proper court action. Until so terminated by a legal divorce, a common-law marriage is as binding on the parties as any other kind of marriage: and it entails all the duties and responsibilities of the marriage relation. It should be understood, however, that in order to constitute a legal common-law marriage, there must be the serious intention in the minds of both parties to become husband and wife: merely living together in illicit sexual relation does not constitute a common-law marriage. There must actually be a mutual intent to assume the relationship of a married couple.

CHAPTER V

THE ETERNAL TRIANGLE

WE have seen, in a previous chapter of this book, that the relatives or friends of either of the parties to an engagement contract are privileged to interfere in the relationship of the engaged couple, to the extent of offering advice or persuasion to induce either party to break the engagement. And we noted at that time that this rule of law was supposed to be for reasons of public policy, and to recognize the rights of rivals. The law evidently considered that the parents, or other relatives or friends of the engaged couple have a right to influence the parties not to take the fatal step.

But the moment the knot is tied, the law immediately calls a halt on any interference between the married pair, and condemns any invasion of the marital relation by outsiders; even by those most closely related by blood or friendship. Yet the law recognizes the right of parents, brothers and sisters, to offer advice to a married member of the family regarding his or her domestic and mari-

tal affairs; and such relatives are free from liability when such advice is given honestly and without evil intention, though it may result in estrangement. But even such close relatives will be liable to the injured party if the advice or interference was inspired by malice or evil intention. And although a member of the family may not have been responsible for a separation in the first instance, yet such member may be held liable for maliciously preventing a reconciliation between the estranged pair.

However, when the one who interferes in the domestic affairs of a married couple is not closely related to either of the parties, a cause of action will lie against such meddling outsider for any suffering or other damage caused to the injured party. An action for "alienation of affections" will lie whenever a third person, "by enticement, seduction or other wrongful or intentional interference with the marriage relation, deprives either husband or wife of the consortium or conjugal fellowship of the other. The gist of the action is always the loss of the consortium, and this without regard to whether the marriage is a statutory or a common-law marriage." And we are told that "Consortium in this connection means society, companionship, conjugal affection, fellowship and assistance, and, since there is always a possibility

of the reunion of a separated couple, and as this possibility is encouraged by law, the action may lie for an interference by a third party even after separation, where this interference prevents such a reunion."

The right of action for alienation of affections arises whenever the unwarranted interference causes an estrangement between the married couple with the resulting loss to the injured party. But the amount of damages which may be recovered in this kind of action depends somewhat upon the motive of the defendant. In other words, in order to be liable for damages, the defendant must have taken an active and intentional part in causing the estrangement; and had a conscious purpose in mind to accomplish this end. It is not required that the defendant's acts should be the sole cause of the estrangement; he is liable if he even contributed in bringing about a loss of affections. The injured party may recover damages without proving that the defendant "had an adulterous purpose in mind."

Of course, it should be understood that if a married person becomes infatuated with a third party, without any fault on the part of said third party, there is no liability. So if a fickle wife falls in love with a dashing moving-picture hero, without any active or intentional wrong-doing on his

part, the husband of the changeable one is not entitled to damages for the loss of his wife's affection. The same rule holds true when the husband falls desperately in love with the beautiful blonde of the cinema. The wife can not recover unless the enchantress was at fault. Either husband or wife may sue different persons who, by their acts, alienated the affections of the wayward spouse.

In defending a suit for alienation of affections, the defendant may show that the plaintiff consented to, or connived at, the acts claimed to have caused the alienation. If this can be shown, the plaintiff can not recover. Yet it has been held that "a husband has a right to watch a suspected wife and leave open opportunities to commit adultery provided he creates none nor invites the evil doing."

After the gallant has succeeded in winning the love of the fickle wife whose husband can no longer hold her, he may, when sued for alienation of affection, attempt to escape liability by showing that the husband and wife were unhappy in their relations to each other. But the courts do not accept this as a good defense to the action, though it might be considered in mitigation of damages.

Or perhaps a woman defendant, who is being sued by the neglected wife for stealing the love of the disloyal husband, may attempt to show that the wife was already estranged from her husband

before the defendant met him. This also is not a good defense. Neither can the wicked woman escape liability to the wife by showing that she, the defendant, was originally not to blame, but was in fact seduced by the unfaithful husband. Neither is it a good defense to this action to show that there was little or no affection between the married pair; or to show that what affection there had been, had not been entirely alienated. Or that the erring spouse is more at fault than the defendant. It is not a good defense to an action of this kind even if it be shown that the husband and wife were living apart at the time complained of; or that others besides the defendant had won the wayward one's affections. And a suit may be brought for alienation of affection even after the married couple had been divorced. Neither is it a valid defense to show that the defendant had never had illicit sexual relations with the alienated one, as legal liability exists for merely causing, or even for merely aggravating the estrangement. In actual practice, however, a suit for alienation of affection is hardly ever brought unless adultery can be proved.

On the other hand, strange as it may seem at first sight, even proof of adultery by the defendant with the erring spouse will not, of itself, establish the fact of loss of affection. For, as held in a Connecticut case in which a wife sued a woman defendant

for alienation of the husband's affections by committing adultery with him, the trial court had instructed the jury as follows: "Adultery is the invasion of a conjugal right, and of itself gives the injured party a right of action, for the law presumes that wherever there is an adultery by a woman with the husband of another, there is alienation of the affections of that husband from the wife, and proof of adultery under such circumstances amounts to proof of alienation of affections. So that in this case you cannot find adultery to have occurred, and refuse to find alienation of the plaintiff's husband's affections."

The jury in the above case awarded the plaintiff wife a verdict of $1208.00 (this odd amount appears to have been obtained by the members of the jury striking an average of the different amounts suggested by the individual jurors, as they were deliberating on the case. One of the reasons assigned as error, on appeal from this verdict, was the fact that it was so obtained; but this ground of appeal the Supreme Court refused to consider as reversible error), and the defendant appealed to the Supreme Court of Errors, assigning various grounds as reasons for the appeal. Commenting on the above charge of the trial court to the jury, the Supreme Court of Errors said in part: "We find no authority supporting the court's charge, and we

are satisfied, upon reason, that there is no presumption of law that in every case of adultery the law presumes an alienation of affections. Proof of adultery is evidence tending to prove the existence of the fact of an alienation of the affections, and the circumstances may make of it strong proof of this. In another case the fact of adultery may exist and no alienation of the affections between a husband and wife follow. Particularly true might this be when the act of adultery was an isolated one. Wife or husband may have succumbed to a stronger will, to a sudden temptation, to persuasion or artifice, while the affection of neither was estranged or stifled by the adulterous act. Either may look back with dismay or even disgust upon his or her weakness, and turn with renewed respect and affection to his or her loyal helpmate. Especially in the case of the man, passion may lead him astray and leave in him no trace of affection for the object of his lust, or disturb in the slightest the conjugal affection he held for his spouse. A presumption of law must be based upon facts of universal experience and be controlled by inexorable logic. It is asserted as a self-evident result of human reason and experience. Neither experience nor logic will permit such presumption to be drawn, as matter of law, from the fact of adultery. As a matter of fact it would depend upon the circumstances of

each case; it has the force of an argument and that is all."

Though, as we have just seen, alienation of affection can not always be presumed from mere proof of adultery, yet the law allows a separate and distinct action to the wronged spouse against a defendant who has committed adultery with the erring partner. This action is called a suit for "Criminal Conversation," and is usually an action brought by the husband against his wife's paramour. It may, or may not, be combined with an action for alienation of affection.

The amount of damages that may be recovered in an action for alienation of affection depends upon the circumstances of the individual case. The damages are supposed to compensate for "the natural and probable consequences of the act complained of." In the case of the husband, "the recovery may include the value of the services of the wife, the loss of her society and assistance, less the performance of the duty of the husband to support, clothe, and care for her." In the case of the wife the damages may be for loss of her husband's affection, support, protection, comfort and society. The value of the loss of support depends somewhat on the financial circumstances of the husband, and in order to recover for this particular item, there must be some proof that the support

was actually lost. Either husband or wife may also recover for "mental anguish," and "injury to character."

Besides the ordinary damages which may be proved in this form of action, the plaintiff is sometimes entitled to "exemplary damages," which are additional damages awarded where the alienation was a malicious or wanton act of the defendant. These exemplary damages are either for the purpose of compensating the plaintiff for the special suffering, or else as a special punishment to the defendant.

On the other hand, it may sometimes happen that the circumstances warrant a mitigation of damages; and such damages may sometimes be given when it is shown that the plaintiff had mistreated the erring spouse or had otherwise been not entirely free from fault.

Though the action of the complaining husband or wife against the defendant for alienation of affections or criminal conversation is sometimes warranted, the fact that excessive damages may sometimes be awarded against a wealthy defendant has led many unscrupulous persons to connive at the downfall of some wealthy person whom they later desired to blackmail. To accomplish this end the victim may be "framed" so as to be detected in some compromising position with one of the con-

spirators, and then either blackmailed under threat of legal procedure, or else made the defendant in a suit for alienation of affections or criminal conversation. Such cases have been all too common; and all such actions should be most carefully considered by the jury in reaching a verdict.

PART II

CUPID IN TEARS

CHAPTER VI

HISTORY OF DIVORCE

"THERE are three great events in a human life," said an ancient sage, "and these are to be born, to get married, and to die." "And," he continued, speaking to his listener, "now my friend, you have been born, you have just been married, and there remains for you only to die."

To how many who have entered that state which seems to promise so much happiness has come the feeling that marriage has for them been the end of love, and that indeed all that remains for them is to die. For during many centuries, when the Church was all powerful and had sole control over the granting of divorce, death was the only release for those whose married life had become a torture instead of a blessing. While living, it was almost an impossibility to be freed from the bonds of matrimony, however desperate the case might be. True, if one was very powerful politically, or possessed great wealth, a divorce might be obtained; for with enough money or political influence strings could be sometimes pulled and a decree of divorce

bought. But for the ordinary person who was without power, influence or wealth, escape from marriage was more difficult than (according to Scripture) for a rich man to enter Heaven.

Not, indeed, that it was always so. On the contrary, during many centuries before the Christian Church obtained control of marriage and divorce rights, a divorce could be had almost for the asking.

"If marriages are made by mutual affection," said the Roman Emperor Justin, "it is only right that when that affection no longer exists, they should be dissoluble by mutual consent."

To anyone not blinded by religious bias, the sentiment expressed in the above words will appeal almost with the force of an axiom. So filled with truth are the words of the great Emperor that, before people became stupefied with church dogma, they were accepted as a matter of course.

However, it must not be understood that because divorce was easy to obtain the above principle was established without a struggle. For in very early times the right to obtain a divorce was the sole privilege of the husband: the wife had very little to say in the matter. And that little received no attention.

We have seen in a former part of this book how, at one period of human history, wives were

obtained by capture from enemy tribes. At a somewhat later date, when a certain amount of economic progress had been made, wives, instead of being stolen or captured, were bought of their parents or guardians. Under either of these conditions it is hardly likely that the status of a wife would be regarded as much superior to that of a slave. Being considered as a chattel and a drudge, her condition was indeed deplorable. In such circumstances it is not to be expected that much thought or attention would be paid by the ruling sex to any grievance she might have, or to any complaint she might make against her husband. During those early times it was most certainly "a man's world."

In the early years of Roman history "The wife was looked upon as the property of her husband, who either bought her, or acquired her by prescription or by a religious ceremony. Afterwards she came to be regarded not as his property but as his child. As he had the power of life and death over her, the law stepped in at an early date and provided that instead of killing her when he was tired of her, or whenever she asserted her independence—which he was now only allowed to do if she were taken in adultery—he might divorce her." We see, therefore, though divorce was for a long time the sole privilege of the husband, it was really invented for the protection of the wife.

By divorce she merely lost her husband; previously she might have lost her life.

Any slight reason or pretext was sufficient for a husband to obtain a divorce from his wife; for we learn: "The early laws provided that the husband might divorce his wife if she were guilty of drinking wine, of going out without a veil, speaking to a woman of inferior rank in the street, or going to a place of public amusement without her husband's consent; all these being regarded as perversity of morals. In all these cases the husband incurred no penalty or moral blame for the divorce, and he was relieved of the necessity of maintaining his wife after divorce." Well might the modern henpecked husband sigh for the good old days that are no more!

The early Roman divorce was practically the same as it was among the Jews at the time of Christ. The old Hebrew laws permitted divorce "for the sake of domestic peace, to check the pride or disobedience of wives and the anger of husbands." Both the Roman and the Hebrew laws considered the matter to be purely a personal one, and so neither system required a public trial. All that was necessary was the delivery by the husband to the wife of a bill of divorce. The rights of women, among the Jews, were not entirely neglected, for it is said that even in the time of Moses

an attempt was made to define certain grounds for divorce for the protection of women. Also, the wife had certain rights to obtain a divorce on her own petition, although she had to go to court in order to obtain it. When the court, after hearing her complaint, decided that she was entitled to it, the husband was bound to give her a bill of divorce. Though there was still considerable discrimination in favor of the husband, yet the old Hebrew law was a great advance over the arbitrary power of the male among other peoples, and furnished a much needed protection to the woman from injustice in cases where she did not consent to the divorce.

Before the Roman Empire had become subject to the influence of the Church, marriage had been considered a sort of private partnership "in which the parties were equal, and shared in all rights." Being founded on mutual affection and consent, "the parties had the right to dissolve it, when that affection had turned into aversion either by consent or by one of them giving formal notice to the other, exactly like any other partnership, and no judicial or other inquiry into the causes of the divorce was necessary. So far from divorce being regarded as dishonorable, all agreements between the parties forbidding the right of divorce were

held to be void and an infringement of the rule that marriages ought to be free."

How far in advance the old Romans were, compared to our so-called modern views on this subject, is forcefully brought to our attention when we read: "To compel an unwilling party to remain married was as unthinkable to the Romans as to compel an unwilling party to enter into marriage." The logic of that view seems to be unanswerable.

As marriage was, in the Roman Law, considered purely as a private matter between the parties, so, likewise, was the dissolving of that marriage an equally private matter. From the public interest it was only necessary that it should be complete and final; the ceremony of divorce being somewhat similar to the making of a last will. "The one spouse delivered to the other, through a messenger and in the presence of seven witnesses, a letter expressing the intention to put an end to the marriage, and saying that the other might in future keep his or her own property, but no ground for divorce was stated. If the letter of divorce was delivered in sudden anger, it was not binding until it had been ratified by a final determination; if after the delivery the divorcing party changed his mind, the other could become the divorcing party."

No inquiry was made into the causes of the divorce, so long as the parties came to a peaceable

agreement about the division of their property, and made satisfactory arrangements for the welfare and future of their children. If the parties could not agree amicably about these things, a judicial investigation was then had in order to determine what was the fairest distribution of the joint property, and what was the best disposition of the children.

In our so-called enlightened times, in order for either party to become free of an intolerable union, it is often necessary to bare the most intimate secrets to a vulgar public. Generally, the dirtier the linen that is to be washed in the laundry of the divorce courts, the more eager are the scandal-hunters to attend. In most of the divorce cases in our modern courts, all the slumbering hatreds are fanned into flame. The couple, who have found that they can not live together, are not allowed to part as friends, but must bring all sorts of incriminations against each other. Not only do they usually part as bitter enemies, but the families and friends of both are often lined up against each other in savage hostility.

How different, and how infinitely better the old Roman and Hebrew customs and laws regarding this matter. Under those laws a married couple seeking a divorce were not obliged to publicly prosecute each other. Being generally able to agree

about the disposition and distribution of their belongings, they could separate in a friendly manner; avoiding all that hatred and bitter animosity which the modern public divorce trial always engenders. "In the rare cases where they could not settle the terms of the dissolution of the partnership, the court, at the request of either party, settled these matters after divorce, as in any other partnership dispute. The basis of judicial settlement in such cases depended upon the question of moral blame attaching to one or other of the parties, and the old rule of the forfeiture of a certain amount of property in the other's favor by the one who had been guilty of "perverse morals" remained, wherever the innocent party sought such forfeiture." Every means seems to have been taken to avoid any public inquiries into the intimate secrets of family life (at the present day it seems that every means is taken to pry into those very same secrets). The fairness and reasonableness of the Roman divorce is almost too great to be true; for we are told: "For a long time these matters were settled by a family council; this was turned later into a public inquiry before a judge, probably because where the spouses were unable to agree about these matters the relatives would be no less unlikely to come to an agreement. The judge in this way obtained a discretion as to the

care and custody of the children, which he used in their interest, though the question of morality largely influenced his decision. After divorce each party had to contribute towards the education and maintenance of the children, according to their means. If the parties were equally guilty of "perverse morals," or if the husband had connived at his wife's adultery for the purposes of gain, the judge refused to interfere, and left the parties in possession of whatever property each possessed." We clearly see, from all this, that divorce was strictly a private matter between the parties, and was not even considered as a legal action.

Such were the main principles of divorce under the early Roman and Hebrew laws. Principles which have, as Mr. Bryce has said, "a special interest as being the last word of ancient civilization before Christianity began to influence legislation. They have in them much that is elevated, much that is attractive. They embody the doctrines which, after an interval of many centuries, have again begun to be preached with the fervour of conviction to the modern world, especially in England and the United States, by many zealous friends of progress, and especially by those who think that the greatest step towards progress is to be found in what is called the emancipation of women."

Fair, humane and enlightened as the practice of Roman divorce has been shown to be, it yet received considerable antagonistic criticism, especially (as might be supposed) from the early Fathers of the Church, notably Tertullian and Jerome. Much adverse criticism was levelled at those who sought continual change of wives by frequent divorces. Some of this criticism may have been well founded, but as Mr. Lecky has pointed out: "Of those who scandalized good men by the rapid recurrence of their marriages, probably most, if marriage had been indissoluble, would have refrained from entering into it, and would have contented themselves with many informal connections, or if they had married, would have gratified their love of change by simple adultery. A vast wave of corruption had flowed in upon Rome, and under any system of law it would have penetrated into domestic life."

In this connection it is well to bear in mind the statement of S. B. Kitchin in his "History of Divorce:" "The condemnation of Roman divorce has always emanated principally from those who in some form or other have advocated the dogma of the indissolubility of marriage, or have followed the long tradition of associating divorce solely with some crime or immoral act. The utility of the Roman law and the alleged connection between

divorce and immorality will be better appreciated and estimated when the later history of divorce in Europe has been examined."

Compared to the reasonableness of the early Roman and Hebrew divorce laws, our modern laws on the subject are, in most cases, the limit of absurdity. For in most, if not all, of the United States, it is utterly impossible for a married couple to agree to a friendly divorce and obtain it. Such an agreement, sensible and fair as it might be, is called "collusion," and to our modern divorce courts this is considered several degrees worse than murder. No husband and wife, who happen also to be gentleman and lady, can appear before a judge of a divorce court and, by honestly telling of the causes of their marital unhappiness, be freed from the bonds that may be ruining the life of both. O, no! such a procedure is altogether too rational to appeal to the legislators who draft our divorce laws. (These legislators, by the way, in matters pertaining to marriage and divorce are usually influenced to a considerable extent by the ministers and priests of the various Churches. Any attempt to rationalize and civilize our divorce laws meets with a loud howl from the clergy). So in order to obtain a divorce in this enlightened day and age it is first necessary for one or both of the

parties to lose all sense of decency and refinement, and become as vulgar and as corrupt as the law says he or she must be in order to give the other party legal "grounds for divorce."

If both parties abhor the actual committing of the various offenses outlined by statutes in the different States as constituting grounds for divorce, then they do the next best thing and merely commit perjury. It is usually agreed between them that one party bring charges against the other in a divorce action, and the other party agrees not to contest it. Of course this is that terrible "collusion," mentioned before, which the Courts regard with so much horror; and, if discovered, the divorce that is so obtained is generally declared void. The party who commits perjury is also punished if accused and convicted (which very rarely happens in this kind of action). Evil as this method is, it is probably better than for either party to commit adultery, or any other offense specified by statute as necessary for divorce. That a considerable percentage of the divorces granted in this country are obtained through collusion and perjury is well known to most lawyers and judges; but both bench and bar close their eyes to the facts; realizing that until our divorce laws become really civilized there is no other way out.

How did it happen that the early divorce laws, having been, as we have seen, so enlightened and reasonable, should become degraded to the vicious absurdity which we now find? This pitiful change was largely due to the mistaken asceticism of the early Fathers of Christianity. Their views on the interpretation of certain passages in the Scriptures, apparently forbidding divorce, was the chief influence in formulating the doctrine of the indissolubility of marriage. At first the Church did not absolutely forbid divorce, but it attempted to control the granting of same, and to allow it only for causes having its approval. In the early part of the Fifth Century it was proposed at a counsel of the Church Fathers to abolish divorce altogether, "the parties being condemned to remain celibate or to become reconciled." Human nature was, apparently, entirely ignored; for it seems not to have been realized that such a decree would not only fail to accomplish its purpose, but would also tend to drive the parties into adultery.

We get a little insight into the perverted state of their minds when we find that even honorable marriage was considered as a "defilement" and was only permitted on the principle that "it is better to marry than to burn." Finding it impossible to prevent marriage entirely, they attempted to limit it as much as possible by forbidding a

second offense. A second marriage, after a divorce, or even after the death of one of the parties, was considered by them to be equivalent to adultery. No doubt they experienced a great deal of suffering from unsatisfied sexual desire (which they considered as coming from the Devil), and this led them to denounce any manner of sexual indulgence. Marriage was considered as "a refuge from fornication or a matter of convenience, and woman as a source of sin, and indeed the source of Original Sin." So we need not be surprised when we read: "The inordinate influence of the sexual passions and a reaction in favour of celibacy, which impelled Origen to mutilate himself and St. Augustine to bewail his marriage as much as his earlier experiences of concubinage, must be taken into account in estimating the views which the Fathers held upon divorce and upon women. Their views on women were taken from the teaching of St. Paul and from North Africa and the East, where most of them originated." The situation then prevailing is well summed up in the following passage: "Marriage was regarded as a sort of mutual prison from which there was no escape except by the commission of a crime. Marriage being a confession of weakness, divorce was a confession of greater weakness. The human affections were regarded as of no account, and submission to whatever political

or civil condition men and women found themselves in was the essence of patristic teaching. To regard the tenets of the Fathers as binding upon modern life would be as valuable as to accept the views of those who objected to all prisons and yet said that once people were in prison they must remain there all their lives, and joyfully endure as the will of God whatever punishment the most inhuman gaoler might inflict upon them."

Probably yielding to the demands of the masculine membership of their congregations, a point was granted in allowing a divorce to the husband in case the wife was guilty of adultery. But the wife seems not to have been given the same privilege. For according to the words of Jerome, who seems to have exercised considerable influence in shaping the marriage and divorce laws of the latter part of the Fourth and early part of the Fifth Centuries, the wife was literally bound to her husband "till death do them part," (unless, as we have seen, the husband obtained a divorce from her on the grounds of her adultery). Let us see how Jerome regarded the marriage tie as far as the wife was concerned: "So long as the husband lives," says this Father of the early Church, "whether he be an adulterer or a sodomist, or be steeped in all manner of crime and the wife has left him on account of those crimes, he is still to be regarded

as her husband, and she is not allowed to marry again." (Evidently the day of equal rights for women had not then arrived). After reading this we can well believe the opinion of Luther regarding this pious man, when he says to him: "He teaches nothing about faith, or hope, or love."

As Jerome's opinions regarding marriage and divorce seem to have been shared by the other leaders of the early Church, and as all orthodox churches are notoriously slow in adopting any improvement, we begin to see how it happens that while progress has been made in nearly every other department of human relationship, the marriage laws are still nearly as barbarous as they were fifteen centuries ago.

To what extremes of stupidity humanity can go in the formulating of marriage and divorce laws is well illustrated in England, where for hundreds of years, up to very recently, it required a special act of Parliament to grant a divorce, regardless of the grounds therefor. Consider for a moment the utter absurdity of it: Any stupid minister, (this is merely stated as a fact, and is in no way intended as a reflection on those to whom the description does not apply), any ignorant, unlettered village justice, can unite in marriage a man and woman, regardless of how mismated they may be; yet it

takes the highest law-making assemblage of the greatest Empire in the world to separate them! And this among a people in many ways as enlightened as any to be found on Earth. But let us not laugh at the ridiculous situation presented in England, for in most of our own states the laws on this subject are little or no more advanced.

This picture would indeed be discouraging were it not for the fact that with the great increase in education among the masses, which has taken place in the last two or three generations, the power of the Church (which has always depended mainly on the ignorance of its subjects) has proportionately weakened. It may not be too much to hope that within the next hundred years our marriage and divorce laws will become as enlightened as they were two thousand years ago.

Lest it be thought that the interpretation given here (of the Church teachings and influence being to blame for the deplorable conditions pictured above) be false or prejudiced, let us quote Mr. Bryce again: "To pass from the civil law of Rome to the ecclesiastical law of the Dark and Middle Ages, is like quitting an open country, intersected by good roads, for a tract of mountain and forest where rough and tortuous paths furnish the only means of transit."

But why should the Church watch so zealously over the matters of marriage and divorce? The explanation seems to be that it became highly profitable for the high officials of the early Church to obtain control of family organization and family dissolution. It appears from early records that when Christianity was obtaining a foothold in Europe, some of the Popes initiated the custom of issuing "Decretals," which were decrees "in which they gave their decisions upon all kinds of spiritual and temporal matters which had been referred to them by the faithful for their spiritual advice, and these Decretals soon came to take the place of Imperial laws and to be observed as binding upon all Christians, being considered by the subordinate ecclesiastics as of greater weight than Scripture. In the twelfth century, Gratian, a monk and lawyer of the great law school at Bologna, published an authoritative collection of these Decretals, some of which were spurious, but all extolling the supremacy of the Church in all matters, together with commentaries in the form of canons of the Church councils, passages from the Bible, the Fathers and the Roman law."

After a number of these "Decretals" had been issued by the various Popes, a collection of them was made, and this later developed into the Canon Law of the Church.

By this law, marriage was declared to be "indissoluble." But as it occasionally happened that some powerful king or nobleman, or rich land owner, desired to be free from an "indissoluble" marriage, the Church could not resist the temptation to fill the cash register. A group of churchmen who were trained in the Canon law (and who, like all lawyers, were always on the alert for an opportunity to earn an honest dollar), began to search for loopholes in that part of the Canon Law which declared that people once married could only be separated by death. (This was rather hard on the Church lawyers, since dead people pay no fees). Once the idea entered the heads of these worthies, it did not take them long to discover Biblical authority for the proposition that "fornication" was a good ground for divorce. While they all agreed as to this, "They differed considerably as to what that word meant, interpreting it to mean variously—adultery, suspicion of adultery, spiritual adultery, heresy, blasphemy, unlawful desires or world views, or some other criminal or immoral act; while some of them doubted whether the Church should extend its blessing to one or both of the parties upon a second marriage, and some again made a distinction between the rights of husband and of wife."

Now, the Bible being notoriously subject to con-

flicting interpretations, we need not be surprised that these shrewd Canon lawyers made the most of Biblical ambiguity. For in Lecky's "History of European Morals" we read: "The greater the mystery in the Biblical words, the greater were the pretensions of the papal lawyers to exercise jurisdiction over such matters. The text in St. Matthew saying that adultery could be committed by the mind alone was applied by them to a case in which a wife or husband, while performing their marital duties, were occupied with the thought of another man or woman, and it was decided that this was adultery."

A valid ground for divorce having been found, those who could afford it soon took advantage of the opportunity to dissolve the "indissoluble." (The logic of this proposition is only understood by those who have acquired the ecclesiastical facility of blowing hot and cold in the same breath). But apparently there was still a fly in the ointment of their satisfaction; for at first, after a divorce had been obtained, the parties were not allowed to marry again. "If either party after divorce married again, it was adultery. The only divorce allowable according to this theory was separation from bed and board or judicial separation. But it is clear that this rigid doctrine was never strictly maintained. In a great number of cases the separa-

tion operated as a dissolution of the marriage, for the hope of reconciliation was in most cases a fiction, while the Church often pronounced a permanent separation between the parties and did not greatly concern itself with what happened to them afterwards. If either of them married again or lived in adultery, their crime was only a minor one which was subject to light penances. The discretion of the bishops and the dispensing power of the Popes was practically unlimited, and by the omission by the bishop, on pronouncing the divorce, of the injunction that the parties were not to marry again, the Church frequently connived at re-marriage, especially where the parties were wealthy or powerful."

Having once tasted of the "flesh-pots of Egypt" in the form of lucrative fees, and having found same to their liking, our friends the Canon lawyers, looked about for some further means to enlarge their field of revenue. Having found that the interpretation of the Biblical word "fornication" was too limited to suit them as a means of profit, (even though it was made to include much more than our usual modern interpretation), they set about to make it more inclusive. So "This flexible and doubtful term was therefore interpreted to mean heresy and infidelity, which were said to be equivalent to idolatry, which again was spiritual

adultery, and even worse than physical adultery. Religious differences of this nature therefore between the parties became valid grounds for divorce. This interpretation was strengthened by the application of the well-known text of St. Paul, which said that if the unbelieving spouse departed he should be allowed to depart, for the faithful spouse was not bound in such a case—a text which afterwards served the Reformers in the like case to establish their doctrine of malicious desertion. St. Augustine was relied upon as having said that the limb which scandalized the husband or wife should be amputated—a striking illustration of the idea of divorce being a surgical operation which lay at the root of the Canon Law of divorce."

Although the field for profit was thus considerably enlarged, it was yet insufficient to feed the growing appetites of the legal department of the Church. Accordingly, "Once the Church had established its claim to exclusive jurisdiction over divorce, it began to divorce persons upon grounds which did not even purport to be based upon the Scriptures, but upon purely human grounds. An attempt upon the life of one of the parties by the other was recognized as a good ground for the dissolution of marriage by a council of the Church in the year 870, and the innocent party was allowed to marry again."

Lucrative as all this came to be, there were yet juicier plums to fall into the lap of the Church. It soon occurred to some of these honorable gentlemen that if working one end of the game was good business, working both ends would be even better. (A logical conclusion that is difficult to deny.) Marriages between blood relations having been forbidden by the Church from time immemorial, the restrictions later came to include relationships by marriage, or affinity, where there was no real relationship at all. By this interpretation, all the relatives by blood or marriage became equally related to one another. And further: "To this wide scheme of relationship was added a new kind of relationship called spiritual, for by such sacraments as baptism and confirmation, the recipient of the sacrament was said to be 'born again' and therefore became related to his sponsors, the officiating priest, and all their relatives. Where such a wide list of impediments to marriage existed—to which were added many other impediments which were all committed to memory, together with the principal rules of the Canon law, by the monks by means of sonorous doggerel verses—it is obvious that many who found themselves so related would wish to intermarry, especially as no real relationship in most cases existed between them. Hence arose the necessity of purchasing dis-

pensations, and it is the common observation of historians and lawyers that all these impediments were "providentially discovered" by the Popes for the entrapping of humanity, and especially for the purpose of obtaining revenue when they could not do so by direct taxation."

Having thus inserted an ecclesiastical finger in the domestic pie, and having successfully pulled out the fat plums of profit by the sale of dispensations to marry within prohibited degrees, more light dawned on the mercenary minds of our God-fearing gentry. We now learn: "Dispensations even where they had been obtained were often a frequent source of litigation and considerable profit to the papal lawyers whenever either of the parties wished for a divorce and accordingly began to doubt the validity of their dispensation. Where no dispensation had been obtained, the parties, when they found their married life unhappy or intolerable, began to investigate their pedigrees, and were unlucky if they could discover no impediment sufficient to establish the right of divorce."

The whole matter is well summed up in the words of Mr. Kitchin: "The doctrine of the indissolubility of marriage, which was said to be laid down by the Gospel, clearly was never more than a Utopian idea, during the long reign of the Canon law, a rule which was never practiced ex-

cept to keep women in subjection and men and women under the perpetual tutelage of the Church. Men, and especially powerful or wealthy men, could always either obtain divorce or find some means of evading the rule even in the days when the Church was most powerful and had an opportunity of enforcing its doctrine. But litigation, especially where it concerned family troubles, was a perpetual source of profit to the Church, and was encouraged to the utmost to the infinite wretchedness of the people."

Such, briefly, was the origin and early history of ecclesiastical divorce before the time of Luther. Let us now see what changes, if any, took place in the matter of domestic affairs after the Reformation.

It is the history of revolutionary movements in general (be they social, political, theological, or what-not), that they begin with a maximum of promises and end with a minimum of accomplishments. Not, indeed, that the ultimate results may not be considerable; but almost universally the immediate benefits realized are disappointing; and experience has shown that the ends attained usually fall far short of what was hoped or anticipated.

When Martin Luther burned the Canon law, at

a public bonfire at Wittenberg, with the words, "Because thou hast vexed The Holy One of God, let the everlasting fire consume thee," he started a movement that held forth great promise for the freedom of thought. Of this event, H. C. Lea has written in his "A History of the Inquisition": "The hour, the place and the man had met by a happy concurrence, and the era of modern civilization and unfettered thought was opened, in spite of the fact that the Reformers were as rigid as the orthodox in setting bounds to dogmatic independence."

But the Protestant movement, though a rebellious child, was still a child of the Catholic Church, and it proved the truth of the saying "The apple does not fall far from the tree," by merely substituting for a number of absurd dogmas, other dogmas equally absurd.

Upon certain points regarding marriage and divorce the Reformers were agreed: "That the Canon law was anti-Christian and false law, that marriage was not a sacrament or spiritual matter, but a civil contract, that judicial separation had no Scriptural authority, that divorce on the grounds of adultery and malicious desertion was allowed by the Scriptures, and that these grounds ipso facto dissolved marriage without the necessity of a judicial trial." Besides adultery as a ground for divorce, the Reformers added "malicious deser-

tion," but both the Reformers and the followers of the Canon law paid no attention to the actual welfare of the people.

Desertion and absence for a long time had been the established ground for divorce for some centuries throughout different parts of Europe, but now it became "the crowning achievement of the Reformers to treat it as 'malicious' and make it into a crime. To go out of marriage, once being in, was a sort of crime, and so crime, and crime alone, was regarded by the Reformers, as it had been by the Canonists, as the only legal ground for divorce according to the Scriptures."

By considering marriage as a sort of prison in which men and women, once married, were sentenced to life, and by making divorce as difficult to obtain as possible, both the Catholic Church and the Reformers showed their preference for immorality and polygamy, rather than divorce, for married people. (Since immorality and polygamy are the natural results of unhappy marriages, where divorce is not allowed, this same preference may be said to exist at the present time).

The position of married women was as bad or worse after the Reformation as it was before. Both men and women were "compelled to conform to rigid Scriptural rules, regardless of their wishes or welfare," and we are informed that "By the Refor-

mation all men and women had been declared to be their own priests, but this opinion, like the promises of reformers in all times, was never observed in practice when the new laws had established themselves. Technically husband and wife had equal rights over each other's bodies, as St. Paul had said, and as the lawyers laid down. But in most countries the wife was expected to endure with patience the cruelty, adulteries and other misconduct of her husband, who was still regarded as her 'head'. The wife was legally a minor and had no legal personality or any right to the children, whom she had borne, until the death of her husband or until she sued him for a divorce or a separation." By the Reformation, as under the Canon Law, the wife had no rights to any separate property of her own. The husband could dispose of it in any way he saw fit and "she could not interdict him from wasting it in debauchery without the expense and disgrace of a public trial, and often when it was too late. The fiction that the domicile of the wife was that of her husband was borrowed from the Canon law and applied to divorce, so that a wife could not obtain a divorce unless she followed her husband wherever he chose to go, and if she did not follow him she was liable to be divorced and punished as a malicious deserter." Under both systems the wife had little or no pro-

tection against her husband's ill-treatment or abuse, and he still maintained the right to "chastise" her. "If the wife left her husband on account of his cruelty she was refused the remedy of divorce, and was compelled to return to his authority if he gave security for good behaviour, and if she did not do so she was liable to all the penalties of divorce as a malicious deserter, including the loss of a portion of her property and, what was the most important in her eyes, of the custody of her children. Public opinion always condemned the wife, and where she was unhappily married made her choice one between slavery and the stigma of being a divorced or separated woman, for public opinion, then, as now, always excused the man and condemned the woman, no matter what the merits of the case might be."

All told, the effect of the Reformation upon the former law of marriage and divorce was very slight. The dogmatic rules of the Canon law were followed by rules equally dogmatic of the Reformers. If the Reformation achieved anything, it was that it made future religious toleration possible, by splitting up the despotic power of the early Church. This led to the weakening of the religious view of marriage, and substituted the gradual recognition of the secular nature of the marriage relation as based on a contract between the parties. But

by the new law as well as by the old Canon law, "People were compelled to obey a divine law which varied according to the view of it which was incorporated in the laws of the land. Married persons who had been capable of entering into marriage, when they discovered later that they were utterly unsuited to one another, were treated as children who were incapable of consenting to a divorce, and were compelled to prosecute one another in a public court with a vindictiveness which, if they did not feel, they were obliged to dissemble before they could obtain even a separation from each other. Divorce, which could only be obtained through crime and disgrace, was treated as itself criminal and disgraceful in all cases, and this tradition is still firmly embedded in law and public opinion."

The above quotation is from an English writer, S. B. Kitchin, writing of conditions in Europe. The same absurdities pictured there, may be found in the divorce laws of the United States. When one compares the enlightened wisdom of the ancient Roman law regarding divorce to the barbarous laws on the subject existing today throughout the so-called "civilized countries," one is tempted to cry out with Mark Antony:

"O, judgment, thou art fled to brutish beasts,
And men have lost their reason!"

CHAPTER VII

BREAKING THE CHAINS

HAVING taken a quick glance at the historical development of the divorce laws in the past, let us see what they are now. But before taking up the present law of divorce, it may be well to explain briefly the difference between an "annulment of marriage" and a "divorce from the bonds of matrimony." To understand this clearly it is necessary to realize that there is a legal distinction between a "void" marriage, and one that is merely "voidable." A void marriage, when so determined to be in a proper proceeding, confers no legal rights on the parties, and the legal result is the same as if no marriage had taken place. A marriage is usually declared void when it is found that the parties lacked the legal capacity to enter into a valid marriage. This may be due to prohibited blood relationship, mental or physical incapacity, one or both of the parties being already married, or some other prohibitory condition.

It would seem that when a marriage has been declared void in an action for annulment, the chil-

dren born of such union would be "illegitimate." It is otherwise when the marriage is merely voidable, for in such case the marriage having been valid at its inception, the children born of such union are legitimate, and their status does not change if the marriage is later set aside.

The legal distinction between "divorce" and "annulment" is well illustrated in a case decided by the Supreme Court of California, where it was said: "Divorce means a dissolution of the bonds of matrimony based upon the theory of a valid marriage, for some cause arising after the marriage, while an annulment proceeding is maintained upon the theory that, for some cause existing at the time of marriage, no valid marriage ever existed."

This distinction, however, being used in very rare instances, is no longer of any great importance. Several of the states have abolished it by statute, and it is unnecessary to devote further consideration to a distinction that has practically ceased to exist. Let us then proceed to an examination of the divorce laws as at present found in the United States.

When the American colonies were founded, the colonists brought with them the common law of England. At that time the English law recognized two forms of divorce: Absolute divorce, called

"divorce a vinculo matrimonii" (from the bond of matrimony); and temporary separation, called "divorce a mensa et thoro" (from bed and board). These laws were under the jurisdiction of the ecclesiastical courts, and were not a part of the common law of England at the time of the Revolution. They did not, therefore, become a part of the common law of the colonies.

As there were no courts in this country having jurisdiction of divorce, the only way that it could be obtained at that time was by special act of the legislature. It was due to this lack of the common law on the subject that there developed a wide diversity of divorce laws in the various states. As Mr. Keezer, in his work on "Marriage and Divorce" has said: "Such a situation of diversified divorce laws was the inevitable result of the application of a very confused and divergent religious and social philosophy to an unsatisfactory and admittedly inadequate set of inherited divorce laws. Each state, impregnated as it was with its own peculiar religious faith and social philosophy, made laws believed by the lawgivers to be necessary to promote permanency of family relations and protect the social fabric. Most of these laws had some counterpart in the English absolute divorce law or the law concerning temporary separation. They vary from those allowing divorce for

adultery only, to those granting divorce for mere 'incompatibility of temper.' "

As before stated, there are two kinds of divorce; absolute and partial. The absolute divorce, which is the kind mostly obtained, is a complete severance of the marriage tie. The parties are no longer related in any way as husband and wife. A partial divorce, on the other hand, does not dissolve the marriage; it merely separates the parties "from bed and board" for so long as the decree lasts, or until they agree to use the same "bed and board" again. If a decree of "divorce a mensa et thoro" is obtained upon the petition of the wife, who is an innocent party, the court will usually order the husband to provide her with a suitable allowance for her separate maintenance.

Of course, as in this form of "partial divorce" the marriage tie has not been dissolved, neither party can marry again. This condition, therefore, creates a rather "dangerous" situation and it has been regarded as "rather hazardous to the morals of the parties." Of this situation the English courts have declared: "It is throwing the parties back upon society in the undefined and dangerous characters of a husband without a wife, and a wife without a husband." And Justice Swift, in his "System of Laws" makes the pertinent observation: "It places them in a situation where there is an

irresistible temptation to the commission of adultery, unless they possess more frigidity, or more virtue than generally falls to the share of human beings."

The "partial divorce" is also severely criticized by Mr. Bishop, in his work on "Marriage and Divorce," where he says: "It is destitute of justice and one of the most corrupting devices ever imposed by serious natures on blindness and credulity. It was tolerated only because men believed as a part of their religion that dissolution would be an offence against God, whence the slope was easy towards any compromise with good sense, and as the fruits of compromise we have this ill-begotten monster. It not only punishes the guilty party but it punishes the innocent party as well and should be done away with on the ground that it is against public policy."

It is for the above reasons, and others that might be named, that partial divorces are granted very seldom, and in some states are expressly prohibited. The reasons advanced for the restriction of these separations "from bed and board" are certainly sound, and show a clear understanding of the weaknesses of human nature. Yet it apparently does not occur to those who have obstructed the passage of laws making complete divorce easy to obtain, that the same reasoning applies to cases

where married couples actually hate each other, and yet are not allowed a divorce because neither party desires to become a criminal in order to be free. The clergy of the various churches (who, as stated before, are the strongest opponents of rational divorce laws) though insisting on "morality," are apparently unable to see that keeping a husband and wife, who cordially detest and despise each other, bound in marriage, is also "rather hazardous to the morals of the parties." Also that "it places them in a situation where there is an irresistible temptation to the commission of adultery." But whether the churchmen see this or not, every lawyer, doctor, or other person whose work brings him in contact with domestic affairs, knows that keeping men and women who wish to be free, bound in the chains of wedlock, breeds more corruption and immorality than could possibly be generated by the most liberal divorce laws imaginable.

It occasionally happens that a married couple, finding that they are not happy living together, enter into an agreement to separate, without the intervention of the courts. Such separation agreements were at first not approved by the law, but later came to be allowed "in the interest of privacy." If a separation agreement is drawn up con-

templating a future separation, it is void as being against public policy. In order to be valid it must be made "contemporaneous with or after separation, and must be fair and free from taint of imposition, fraud, duress, or overreaching by the husband." Some states have statutes regulating separation agreements. In such cases the statutory requirements must be strictly complied with.

Once a separation agreement is made and entered into by a husband and wife it remains in force for so long as provided by its terms. But as a general rule, the resuming of marital relations by the parties puts an end to the agreement. Should they again wish to separate, it would be necessary to enter into a new agreement to do so. Let us now proceed to an examination of the various "grounds for divorce."

ADULTERY

The most universal, as perhaps also the most common cause for divorce is adultery. This is usually defined as being "The voluntary sexual intercourse of a married person with one of the opposite sex, other than the offender's husband or wife."

In order to be a legal cause for divorce the act must be "voluntary and criminal." It has been held that where the party was insane at the time the act

was committed; or was ravished by force and against her will; or if it was committed under an honest but mistaken belief that the lawful husband or wife was dead, there is no grounds for divorce. Of course, if the defendant pleads insanity as a defense to a divorce action, it must be proved that the insanity existed at the very time of the offense.

If either party, in order to obtain a divorce, connives at the commission of adultery by the other party, or purposely lays a lure to trap the other party into adultery, such connivance will bar the plaintiff from getting a divorce on the grounds of that particular act. In order, however, to bar a divorce, such connivance must show a consent that the adultery be committed: this consent may be either express, or implied from the circumstances. The mere leaving open of opportunities for adultery, without actually consenting or conniving at its commission, will not bar a divorce.

As this particular offense is almost invariably clandestine, and committed only after every precaution has been taken to avoid discovery, it is almost impossible to obtain direct and positive evidence of guilt. Such being the case, it has been held that adultery may be proved by circumstantial evidence, providing that the evidence be clear and convincing. The proof must show that the

defendant possessed "both an inclination and an opportunity to commit the offense."

CRUELTY

Second only to adultery as a ground for divorce is "cruelty." It is quite likely that adultery is more often committed than the infliction of cruel treatment; yet due to a general reluctance of bringing the charge of adultery against the defendant in a divorce action, the charge of cruelty is perhaps more often brought than any other as a complaint for divorce.

On no other ground for divorce is there such a wide latitude for interpretation as to just what is included in the term "cruelty." The statutes of the different states vary considerably in the language used in creating "cruelty" as a ground for divorce. Among the various expressions used are "cruel and inhuman treatment;" "extreme cruelty;" "cruel and barbarous treatment;" "intolerable cruelty;" "outrageous treatment;" "indignities to the person;" "extreme and repeated cruelty;" etc., etc.

Not only does the language used in the statutes vary considerably, but even more varied are the constructions put by the courts on the expression used by the legislatures. There is, therefore, no

hard and fast rule that will define exactly just what is legally meant by the term "cruelty."

In the early cases in which this charge was brought as a cause for divorce, the courts were inclined to limit the term to acts giving actual physical pain, as distinguished from mental suffering. As one court expressed itself: "Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty; they are high moral offences in the marriage state undoubtedly; not innocent surely in any state of life; but still they are not that cruelty against which the law can relieve. Under such misconduct of either of the parties, for it may exist on one side as well as the other, the suffering party must bear in some degree the consequence of an injudicious connection; must subdue by decent resistance or by prudent conciliation; and if this cannot be done, both must suffer in silence."

Although it is hardly possible to formulate an exact legal definition of the word "cruelty" as a cause for divorce, we may, perhaps, give a general definition of the word by saying that it is such conduct by the defendant to the plaintiff as will cause actual physical injury, or the reasonable fear of it; or such treatment as endangers the life or

health of the plaintiff, and makes living with the defendant unsafe to person, health or life.

On the other hand, some courts have held that no physical violence is necessary as a ground for divorce. Abusive, profane, insulting or indecent language, if often used against the plaintiff, has been regarded as sufficient cause. But neither words nor acts are in themselves sufficient if no injury is done, or if no reasonable fear of injury is invoked. For unless the plaintiff has been actually harmed by the words or acts there is no cause for complaint. In other words, the acts or words of cruelty must be judged by the effect produced by them. If they result in no injury, there is no ground for divorce. It will thus be seen that the character of the parties is an element that should be taken into consideration in determining whether or not there has been legal cruelty. "Their positions in society, their sensibilities and actual physical reactions to external stimuli, mental make up and the like are all a part of the facts and circumstances to be presented to the tribunal passing on the ultimate question of cruelty. Acts inflicted upon or treatment administered to certain individuals might, because of social standing or peculiar mental make up, drive such persons to actual insanity; yet the same acts or treatment might be the cause of only hilarious amusement to others. Obvi-

ously there is no legal cruelty in the latter case." As one court put it rather neatly: "It is not all unlawful and barbarous acts that are made grounds of divorce. We do not divorce savages and barbarians because they act as such toward each other."

We have seen that apprehension or fear of injury may be a cause for divorce, but, of course, the apprehension must be reasonable. Merely becoming foolishly frightened at any slight cause will not do. The fear must be caused by the acts or words of the defendant. In determining what is a reasonable apprehension of danger, all the circumstances of the particular case must be taken into consideration, including the intention and ability of the defendant to inflict the injury feared. The character, training and environment of the plaintiff should also be considered.

The case is somewhat clearer when the acts of cruelty charged consist of actual physical violence. Yet even here there is no sharp defining line to be drawn. Slight injury, such as a slap on the hand or face, has been held not enough for divorce. Yet in this connection the time and place of the injury complained of should be considered. For if a slap in the face, when done in private, might be held insufficient, yet the same act committed in the presence of others may be so degrading as to constitute sufficient cruelty for divorce.

In general, it may be said that in determining the severity of the cruelty complained of, it is necessary to take into account the social station, health, training, refinement, habits, and other characteristics of the parties. For obviously the conduct that might constitute extreme cruelty to a person of great refinement might not be so to a person of coarse and vulgar nature.

A question often asked by those seeking a divorce is "Does denial of sexual intercourse constitute a valid ground for divorce?" The answer to this is not entirely clear. In many states the courts have decided that the denial of sexual intercourse, even for an extended period, and even though the denial was unwarranted, is not sufficient cruelty to give cause for divorce. Other courts have decided that the absolute refusal of intercourse for a long time, when no good reason existed for such refusal, entitled the complaining party to freedom from the marriage bond. The attitude taken by the judges on this question undoubtedly depends on their own temperament, whether ardent or frigid.

Occasionally the opposite side of the question is asked: "Does excessive sexual intercourse give cause for divorce?" In answer to this it may be said that, by the weight of judicial opinion, excessive intercourse is ground for divorce only when the indulgence is dangerous to the health of the

complaining spouse; but not if it results in no harm.

A frequent complaint made as a cause for divorce under the title of "cruelty" is "mental suffering." Although at first this was not considered a valid ground, the modern courts often regard it as sufficient even when not accompanied by any physical violence.

Many and varied are the things complained of as causing "mental suffering." Among them occur such complaints as "laziness," "disrespectful treatment," "neglect of household duties," "obstinate silence," "false accusation of infidelity," "attempt to declare spouse insane," "cruelty to relatives or close friends of spouse," "abuse of step-children," "profanity," "unconcealed aversion," "rudeness," "objectionable associations," "refusal to entertain," "bad temper," "untidy habits," "sullen disposition," and many other serious or frivolous grievances. There is no set rule to determine just what acts or words will cause sufficient "mental suffering" to entitle the complaining party to a divorce. It depends largely on the views of the presiding Judge. Apparently the only way to find out is to try the case in court.

HABITUAL INTOXICATION

By statute, in most states, "Habitual Intoxication" is made a ground for divorce.

These statutes must have been enacted before the Eighteenth Amendment became law, for the "drys," who believe so religiously in the virtues of prohibition and in the efficiency of "enforcement," would have us believe that drunkenness has now become so rare that it need not be considered. Be that as it may, it is still on the law books a cause for divorce.

In the interpretation of the term "habitual intoxication," as in the case of the word "cruelty," we must be content with a mere approximation of a definition. It is purely a matter of degree, and depends largely on the view-point of the presiding Judge, as to just how badly afflicted with the "curse of drink" a person must be in order to entitle the spouse to freedom. It is usually held that an occasional lapse of sobriety is not sufficient ground. The habit of getting drunk must be "persistent," and "frequent." It is not necessary (as a ground for divorce) to be staggering drunk or drunk during business hours. "It is enough if he has the habit so firmly fixed upon him that he becomes drunk frequently and is unable to resist when opportunity or temptation is presented." And as the same idea was expressed by another Court: "There must be the involuntary tendency to become intoxicated as often as the temptation is presented, which

comes from fixed habit acquired from frequent and excessive indulgence."

In general, it may be said that in order to justify a divorce on the grounds of habitual drunkenness, the habit must have been formed after the marriage. For if the husband was addicted to drink before marriage, and the wife knew of it, she can not afterwards complain because she was unable to reform him. The reason for this rule is stated in a case where the Court said: "If the mere fact of habitual drunkenness without reference to the time of its commencement, or the complainant's knowledge of it, be recognized as a sufficient ground for a divorce, we see no reason why she might not have filed her bill on the same ground on the day of the wedding. Nor, if this bill can be sustained, can we see any good reason why we ought not to have sustained it, had she come directly from the wedding into court, and presented her bill, alleging that she had just married a man knowing him to be an habitual drunkard, and asking the court to grant her a divorce, because she had changed her mind and repented of her folly."

DESERTION

One of the common grounds for divorce is "desertion." Nearly all the states have enacted statutes

providing that a divorce may be granted to a spouse who has been deserted or abandoned for the time specified in the statute. The time required varies in the different states from one year to five years.

The State of New York did not allow a divorce on the ground of desertion until quite recently. It now requires a period of five years' continual desertion or unexplained absence before a divorce will be granted. The injustice and cruelty of requiring such a lengthy period before any relief can be obtained, can be readily imagined when it is considered that a wife may be left sick, helpless, and penniless, with perhaps a number of small children depending on her; yet for five long years she is not allowed a divorce from the husband who may have abandoned her without enough means to buy bread for a single day. Being thus bound, the law gives her no opportunity to marry a man who might care for her and her dependents by providing a comfortable home. Even in such a pitiful case (and such cases are more common than is usually supposed) this barbarous law declares, in effect, that she must starve or beg for five dreary years, before she can be free to marry again.

However, we should be thankful that the light of reason has penetrated through the skulls of the legislators even to this extent. For before this new law was enacted (which, as stated above, was very

recently) a wife left in the condition just described would be doomed to a lifetime of loneliness, neglect and misery. She must watch her youth and health pass away while she remains helpless to improve her condition.

In order to entitle the deserted spouse to a divorce, the desertion must be without justification. Some statutes even require that the complaining party must have made some effort to induce the deserter to return, before legal relief can be granted.

It is the privilege of the husband, regardless of the consent of the wife, to establish the family domicile, or to change it as he pleases; and it is the duty of the wife to go with him if he requests her and furnishes her with the necessary means to do so. The wife has not the right to determine the "matrimonial domicile." If she makes a permanent change of residence without the consent of her husband, and without legal cause, such change constitutes desertion on her part.

When a husband has established a matrimonial domicile, and makes a peremptory and unconditional demand upon the wife to live with him there, her unjustified refusal to do so, persisted in for the statutory time, constitutes desertion. However, the home selected by the husband must be one that is reasonably comfortable, and one which

is not dangerous to health or safety. It must be reasonably in keeping with the husband's means.

It should be understood that a separation by mutual consent does not constitute legal desertion. But in case the parties separated by mutual consent, and then one of the parties desired and requested a reconciliation, which the other party refused without good cause, such refusal would usually be considered as desertion.

If before the expiration of the statutory period of desertion, the deserting spouse offers in good faith to return and resume the marriage relationship, the running of the period of desertion is interrupted, and no divorce will be granted.

It seems that it is not always necessary for a spouse to leave the home in order to be guilty of desertion. For it has been held that a persistent and continued refusal of sexual intercourse by one of the spouses without cause or justification constitutes desertion, although the parties remain under the same roof. Commenting on such a situation a Mississippi Court remarked in rather poetic language: "Desertion may be as complete under the same shelter as if oceans rolled between."

OTHER CAUSES

There are a number of other statutory grounds for divorce in the various states which need not be

examined in detail in a work of this kind. Most of these causes might appropriately be put under the heading of "cruelty," and the same rules of law are generally applied to them as are applied to the ground of "cruelty." Among these various statutory grounds are "excessively vicious conduct," "gross misbehavior and wickedness," "gross neglect of duty," "non-support of wife," "personal indignity," "public defamation," and, in a few states, "mutual separation."

DEFENSES TO THE DIVORCE ACTION

Having examined briefly the various "grounds for divorce," let us see what defenses may be used by the defendant spouse. In general, if it can be shown that the act complained of as a ground for divorce was done while the defendant was so insane as not to know the meaning of what he or she was doing, such insanity is usually considered a valid defense. It is also a defense if the misconduct of the complaining party was so gross as to justify or excuse the acts of the defendant. Even adultery by the wife may sometimes be legally defended on the ground that she was driven to it by the coercion, or fault, or connivance of the husband.

In an action for divorce on the grounds of cruelty, it is a valid defense if it can be shown that

the cruelty complained of was provoked by the misconduct of the plaintiff. If the action is brought on the grounds of desertion, it may be considered a defense if it can be shown that the circumstances were such as to justify or excuse the desertion.

But perhaps the most interesting defense to a divorce action is "Condonation." This is the forgiveness of a marital offense constituting a ground for divorce: it bars the right to a divorce. But the condonation is legally considered to be on the condition, either express or implied, that the guilty spouse shall not again commit that offense; and also that he or she shall thereafter treat the other with "conjugal kindness." If this condition is not kept, the original offense as a ground for divorce will be revived. The condonation may be by express words of forgiveness or it may be implied from the conduct of the parties.

The forgiveness of any of the offenses that are grounds for divorce will bar a suit therefor. So if either husband or wife has been guilty of adultery, cruelty, desertion, or any other statutory ground, and has been forgiven by the injured spouse, no divorce can be obtained unless the cause is revived by repetition. If the condition is broken, and the offense revived, it may be relied upon as a ground for divorce as fully as if it had never been condoned.

Though an offense may be condoned by express words of forgiveness, the condonation is not effective unless it is accepted or acted upon by the other party. As stated above, condonation may also be implied from the conduct of the parties. So if one of the spouses has been guilty of some act or conduct that would constitute a ground for divorce, and they afterwards indulge in voluntary sexual intercourse, such cohabitation would amount to a condonation.

Of course, there can not be any condonation of an offense unless it was known to the injured party. So if either party has been guilty of adultery, and the other party, not knowing of it, continues to cohabit with the guilty one, such cohabitation is not a condonation. And it has even been held that there is no condonation where the wife, knowing of her husband's adultery, continue to live with him in the belief that his misconduct had ceased, when in fact it had not. Likewise has it been held that condonation of one known offense is not condonation of other unknown offenses.

In most states it is a valid defense to a divorce action to show that the plaintiff has been guilty of conduct which constitutes a ground for divorce. This is called the doctrine of "Recrimination." This rule is not applied in the same manner in all jurisdictions; being sometimes regulated by judi-

cial decision, and sometimes restricted by statute.

As the doctrine of recrimination is said to be founded on the principle that one who asks relief must come into court with clean hands, it has been held that where both parties are equally at fault no divorce would be granted. In a Michigan case, the plaintiff asked for a divorce on the grounds of extreme cruelty. The defendant denied the charge, and brought a cross-bill charging the plaintiff with extreme cruelty. The trial Court found both complaints to be true, and (using more common sense than law) granted a divorce on each complaint. On appeal to the Supreme Court it was held that under the circumstances the divorce should have been denied. In reaching this decision the Court said: "A proper administration of justice does not require that courts shall occupy their time and the time of the people who are so unfortunate as to be witnesses of the misdoings of others in giving equitable relief to parties who have no equities. And it is as true of divorce cases as of any others that a party must come into a court of equity with clean hands. Divorce laws are made to give relief to the innocent, not to the guilty."

A few states require that the offense set up in recrimination as a bar to a divorce, must be like in kind to that which is the ground in the complaint. But the general rule is as laid down in a Massachu-

setts case where it was said: "A suitor for divorce cannot prevail if open to a valid charge, by way of recrimination, of any of the causes of divorce set out in the statute. Recrimination as a bar to divorce is not limited to a charge of the same nature as that alleged in the libel. It is sufficient if the recrimination charges any of the causes for divorce so declared in the statute. The general principle which governs in a case where one party recriminates is that recrimination must allege a cause which the law declares sufficient for a divorce."

The same rule was applied in a Wisconsin case where a husband sued for a divorce on the ground of his wife's adultery, and the wife defeated his suit by showing, in recrimination, that he had been guilty of such cruelty as would have entitled her to a divorce. In this case the Court said: "We do not perceive, upon what logical principle the court would grant redress to the husband for the adultery of the wife when he himself has been guilty of an offense which would give her a right to an absolute divorce were she without fault. Both parties have violated the marriage contract, and can the court look with more favor upon the breach of one than the other? It is an unquestioned principle that, where one party is shown to have been guilty of adultery, such party cannot have a divorce for

the adultery committed by the other. In the forum of conscience, adultery of the wife may be regarded as a more heinous violation of social duty than cruelty by the husband. But the statute treats them as of the same nature and same grade of delinquency. It is true, the cruelty of the husband does not justify the adultery of the wife; neither would his own adultery; but still the latter has ever been held a bar. And where both adultery and cruelty are made equal offenses, attended with the same legal consequences, how can the court, in the mutual controversy, discriminate between the two, and give one the preference over the other? It seems to us that, as the law has given the same effect to the one offense as the other, the court should not attempt to distinguish between them, but treat them alike, and hold one a bar to the other."

Although, as we have just seen, an offense committed by the plaintiff can be set up in recrimination as a bar to a divorce, yet the general rule is to the effect that if the offense had been condoned, it can no longer be set up in recrimination. This principle was well illustrated in a New Jersey case where the Court said: "An act of adultery committed by the husband, and forgiven for years, should not be held to compel the husband to submit without redress to the faithlessness and un-

restrained profligacy of his wife. The penalty is too severe for a forgiven offense. It is better to hold that, when the erring party is received back and forgiven, the marriage contract is renewed, and begins as res integra, and that it is for the party, and not for the courts, to forgive the new offense."

A decree of divorce, rendered in accordance with the law of the forum by a court of competent jurisdiction, is valid everywhere, and will be given full force and effect in all other states. This rule is subject to the exception that the decree may be attacked on the grounds that the court granting the divorce did not have proper jurisdiction of the action.

It sometimes happens that a party will leave the marriage domicile and go to another state for the sole purpose of obtaining a divorce. In such case there is no jurisdiction unless a legal residence has been established. The requirements for establishing a legal residence for the purpose of divorce is usually regulated by statute.

CHAPTER VIII

REASON VERSUS SUPERSTITION

HAVING sketched briefly an existing condition that is admitted by all thoughtful persons as being highly unsatisfactory, what suggestions can be offered as a possible remedy?

Many are the methods of reform that have been advocated as a panacea for domestic ills, with a promise of ushering humanity into a matrimonial Utopia.

Some of the suggestions have considerable merit; others are useless or dangerous. The solution of the problem about to be offered here is neither original nor entirely untried. It may have been inferred from what has been presented in the preceding pages.

The chief difficulty in finding a remedy for the present matrimonial chaos, is due largely, if not entirely, to the fact that the sexual element in human life has for so long a time been taboo. Though at the present day this is no longer true, and a flood of books have appeared dealing with the subject of sex, yet it must be remembered that

this frankness of discussion is of very recent occurrence. For many centuries the subject was never mentioned above a whisper.

The mystery surrounding the sexual instincts and functions in the early morning of the race, caused primitive humanity to alternately fear or worship them. The sexual organs were either deified or execrated. It was not long before the medicine-man of the primitive tribe realized that in this ignorance, fear and superstition lay a prolific source of revenue. If he could convince the other members of the tribe that what was so mysterious to them was revealed with perfect clearness to him, he might gain control of the matrimonial relation by prescribing the ritual and ceremonies of marriage. He would then be in a position to regulate the terms of marriage and promulgate laws to the effect that no marriage was valid unless performed according to his prescribed ritual. For this he obtained a fee; (something not to be sneezed at even in those days).

The first thing to be done, therefore, was to take the marriage laws and customs from the hands of the civil authorities, and to gain control of the institution for himself. As the medicine-man claimed to be in personal communication with God, we can see how he would soon assume the power to bestow God's blessings on those who married according to

his special dispensation. And, of course, those who dared to marry without his help were not only deprived of God's sanction, but were exposed to the curse of the medicine-man, if to nothing more terrible.

In the course of sociological evolution, the theories and practices (as well as the profits) of the medicine-man were taken over by the churches of most, or all, the religions of the world. And so, also, has the blessing of the church been given or withheld according to whether or not the marriage took place with or without "benefit of clergy."

It will now be clear why the church has maintained a throttle-hold on the matrimonial institution, and why it has so bitterly resisted any teachings that would lessen the mystery of sex and thus take away its so-called "sacred" character.

In all this it should be distinctly and emphatically understood that there is not the least intention here of denying either the "mystery" of sex, or the "sacredness" of the marriage relation. Far from denying or minimizing the mystery surrounding the sexual instincts and functions, it is freely admitted that the mystery is profound, and possibly unfathomable. But so, also, is every other human or animal instinct steeped in inscrutable mystery. In this sense the sexual organs and functions are no more mysterious than the organs and

functions of digestion, respiration, or blood circulation. And to speak of the "sacredness" of the sexual functions is as sensible or as ridiculous as to speak of the "sacredness" of the lungs or liver. Every organ of the body is equally "sacred," and it would be equally grotesque to give a special religious character to the sexual functions, as to say that the ears are more "sacred" than the nose.

Likewise it is certainly not intended here to deny the "sacred" character of the marriage relation. But it is merely suggested that every human relationship that is beneficial to the race is equally so. No wish is here entertained to ridicule or degrade any noble human custom, but only to place all worthy things on the same lofty plane.

If sex be thus stripped of its special mysteries and its special religious character, the way is open to a sane discussion of the problem. And we find a solution that is as simple as it is complete. It needs only to be considered that if a man and woman have enough common sense to be married at their mere request, it would be equally logical that they be allowed a divorce at their mere request. As they entered the union in the hope of finding happiness, they should be allowed to dissolve that union upon discovery that happiness is not there. Society should have as little concern about the divorce as it had about the marriage.

Each should be granted at the mere request of both parties.

If one of the parties wishes a divorce and the other does not, a divorce should be granted only after a hearing by a competent judge to determine what compensation, if any, should be made to the aggrieved party, in order to prevent any unfair advantage being taken by one of the parties over the other. But if both parties express their desire for a divorce, it should be granted on request without even a hearing.

Of course it must be understood that this should be the case only when there are no children to be considered. In cases where there are children, a hearing should always be had in order to protect their interest, and such orders made as will safeguard the present and future welfare of the child. If the children can be adequately provided for, a divorce should be granted without further inquiry, where both parties desire it.

It may be objected that such easy divorce would open the door to all sorts of sexual dissipation and excess. The answer is that even if so, it is better than the present condition which is equally or more profligate, and is joined with deception, hypocrisy and adultery. But easy divorce would probably lead to less immorality than exists under present conditions. For if both parties knew that each could

obtain a divorce without difficulty, each would make special efforts to please the other.

That the views and suggestions here set forth will meet with any great amount of approval is hardly to be expected. In an age saturated with the fears, hatreds, superstitions and prejudices of countless centuries of darkness, it is too much to hope that humanity will suddenly be willing to be guided by the torch of reason. Yet a start has been made, and though progress towards an enlightened goal may be painfully slow, it nevertheless exists. Every member of the noble army who has labored and is laboring for a happier humanity may find his reward in the thought that the good work accomplished and to be accomplished, has been due, at least in part, to his efforts.